COURT FILE NUMBER	1103 14112
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "**1985 Sawridge Trust**")
APPLICANTS	THE SAWRIDGE FIRST NATION
RESPONDENTS	ROLAND TWINN, EVERETT JUSTIN TWINN, MARGARET WARD, TRACEY SCARLETT, AND DAVID MAJESK, as Sawridge Trustees for the 1985 Sawridge Trust ("Trustees")
DOCUMENT	BRIEF OF THE TRUSTEES FOR THE 1985 SAWRIDGE TRUST IN RESPONSE TO THE BRIEF OF THE SAWRIDGE FIRST NATION FOR INTERVENOR STATUS

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ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

DENTONS CANADA LLP
2500 Stantec Tower
10220 103 Ave NW
Edmonton, AB T5J 0K4
Attn: Michael Sestito
Ph: (780) 423-7300
E-mail: michael.sestito@dentons.com

KPMG LAW LLP
Suite #2200
10175 101 St NW
Edmonton, AB T5J 0H3
Attn: Doris Bonora, K.C.
Ph: (780) 801-5927
E-mail: dorisbonora@kpmg.ca

CONTENTS

I. INTRODUCTION

1. On June 28, 2024, the Trustees of the 1985 Sawridge Band Inter Vivos Settlement (the "**Trustees**" and the "**Trust**" respectively) filed a multi-part application for advice and direction in an attempt to finally bring an end to nearly 14 years of litigation (the "**Full Application**").[1]

2. The Trustees understood the Court's direction on certain initial issues could very well shape the next steps they take to conclude the litigation. Accordingly, the Trustees identified a very narrow initial issue – that being paragraph 1(b) of the Full Application (the "**Threshold Question**"):

> Affirming that notwithstanding that the definition of "Beneficiary" set out under the 1985 Sawridge Trust is discriminatory, and includes certain non-members of the Sawridge Nation, the Sawridge Trustees may proceed to make distributions to the Beneficiaries of the 1985 Sawridge Trust, including to non-members of the SFN who qualify as beneficiaries of the 1985 Sawridge Trust.

3. By way of a case management order proclaimed on November 27, 2024, the Court ordered that the Threshold Question would be heard on June 16, 2025 for a full day. The Court also ordered that the Sawridge First Nation's (the "**SFN**") application for intervention status (the "**Intervention Application**") be scheduled for a half day on April 4, 2025.[2]

4. The Trustees propose that the intervention of the SFN ought to be limited to the narrow issue before the court in the Threshold Question – essentially – are the Trustees permitted to distribute assets of the Trust despite the Trust being discriminatory. The Trustees accordingly propose the following order granting intervention status in the Threshold Question only;

    a. The SFN may file a written brief of law on or before May 26, 2025 of no more than 20 pages limited to arguments relating to the Threshold Application;

    b. The SFN may be entitled to provide oral argument of no more than 45 minutes, or such further time as the Court may allow limited to arguments relating to the Threshold Application;

    c. The SFN shall not be permitted to adduce any new evidence; and,

    d. The SFN shall bear its own costs for the Intervention Application and for any participation in the Threshold Application.

    (the "**Trustees' Proposal**")[3]

5. The Trustees have shared the Trustees' Proposal with the SFN, the Office of the Public Guardian and Trustee ("**OPGT**") and Catherine Twinn. The Trustees understand that the OPGT supports the Trustees' Proposal. The Trustees have not received a response from Catherine Twinn. The SFN

[1] Full Application (For Case Management), filed June 28, 2024. [**Appendix, TAB A**]

[2] Case Management Order of Justice J.S. Little, filed January 11, 2025. [**Appendix, Tab B**]

[3] The Trustees have indicated that they would be willing to negotiate the limitations set out in paragraph 4(b) above and that such limitations would be within the discretion of the Court in any event.

was provided with a form of order outlining the Trustees' Proposal.[4] However, the SFN has indicated that they will not consent to the Trustees' Proposal.

6. Previously, the Trustees have consented to the SFN's requests to intervene and the SFN has limited itself to advocating for its members on the issue before the Court. However, the SFN's position on the Threshold Question, as shown in their brief, is not limited to the issue before the Court. It seeks to define the issues and then argue them as an intervenor. Given this approach, it is important to understand the proposed submissions of the SFN before they are granted intervenor status. It is even more important today to address any intervention on any issues in this matter on an issue-by-issue basis because over the long history of this matter, the individuals within the parties have changed and so has counsel for the parties. As such, the arguments and positions made by the parties have not been consistent to allow for a blanket consent to intervention on the Full Application.

7. The Trustees' Proposal will permit the SFN to participate for the limited purpose of representing their members and providing that perspective on the issue before the Court in the Threshold Question – whether in law the Trustees can distribute pursuant to this discriminatory Trust.

II. FACTS

A. Specific Responses to the SFN Brief

8. Rather than recite the facts as the Trustees see them, this section outlines the Trustees specific responses to facts raised in the SFN's brief.

9. Firstly, the SFN has misconstrued the nature of the application before the Court. The Threshold Question is limited to the relief sought in paragraph 1(b) of the Full Application. The Threshold Question is the issue that will be adjudicated before the Court on June 16, 2025. How the balance of the Full Application will be pursued will depend on the Court's answer to the Threshold Question.

10. The Threshold Question does not involve questions regarding:

    a. The validity of the Trust;[5]

    b. The three certainties of trusts;[6]

    c. Whether the Trust is contrary to public policy and if so, can/should the Trust be voided;[7]

    d. Whether the SFN should be involved in any distribution of assets if the Trust is voided;[8] and

    e. Evidence of discrimination.[9]

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[4] Proposed Form of Order of the Trustees. [**Appendix, TAB C**]

[5] Brief of the SFN at p 1, para 1; p 9, paras 36 and 38.

[6] Brief of the SFN at p 10, para 40; p 20, para 74.

[7] Brief of the SFN at p 10, paras 40, 42, 43; p 11, para 50.

[8] Brief of the SFN at p 11, para 50.

[9] Brief of the SFN at p 1, para 1; p 21, para 79.

11. The Trustees have not sought a "result" to change the existing class of beneficiaries to SFN members.[10] The Trustees have also not put the validity of the Trust at issue or tried to void it.[11] Rather, the Trustees brought an application for advice and direction and at this juncture are seeking the advice and direction of the Court on the Threshold Question.

12. Throughout the course of this litigation the Trustees have sought remedies to attempt to cure discrimination to the beneficiaries (whether women or illegitimate children)[12] of the Trust by amending the Trust but not voiding it. The Trustees have fiduciary duties to the beneficiaries of the Trust.

13. Further, the Trustees sought to cure any discrimination to the beneficiaries who might have lost beneficiary status, if the Trust was amended, by grandfathering beneficiaries.

14. This Court has declared, by Order, that the Trust is discriminatory.[13] The Trustees now request the Court's direction on whether they can distribute under this discriminatory Trust. The scope of discrimination is irrelevant to the question the Trustees have placed before the Court. If the Trust discriminates against one beneficiary or potential beneficiary, the question is whether the Trust can still distribute. The scope of discrimination is irrelevant to the legal question being asked.

15. Contrary to the position of the SFN, the objects of the Trust (the beneficiaries) are ascertainable.[14] The Trustees have been gathering information about the beneficiaries and trying to identify them since 2010 when they advertised in over 400 newspapers across Western Canada to find beneficiaries.

16. There is no "fresh" or special expertise in the SFN's knowledge of lineage necessary to qualify as a beneficiary of the Trust.[15] Lineage confirmation must come from those seeking to qualify as a beneficiary of the Trust and investigations with government sources may be necessary such as in confirming who took scrip, or confirming whether the mother or grandmother of a beneficiary acquired their status.

17. There is no substantiation on the SFN's claim that 75% of its members would not qualify as beneficiaries of the Trust.[16] Regardless, it is not relevant whether the scope of the discriminatory definition of "beneficiary" under the Trust is wide. If 75% or more of the members of the SFN do not meet the intention of the Settlor of the Trust with respect to being a beneficiary of the Trust, those who do qualify as beneficiaries still have rights. There are also people who are not members of SFN, but are beneficiaries, and they have a right to be protected as well. The SFN has a perspective, but it is limited.

18. The SFN suggests that it is the Settlor of the Trust, but this is incorrect; the Settlor of the Trust is not the SFN.[17] Chief Walter Twinn (who is deceased) is the Settlor of the Trust.

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[10] Brief of the SFN at p 1, paras 4-5; p 2, para 7.

[11] Brief of the SFN at p 13, para 56; p 22, para 85.

[12] Brief of the SFN at p 14, para 58; p 16, para 65.

[13] Consent Order (Issue of Discrimination) of Justice D.R.G. Thomas, filed January 22, 2018. [**Appendix, TAB D**]

[14] Brief of the SFN at p 20, para 75; p 23, para 89.

[15] Brief of the SFN at p 12, para 53.

[16] Brief of the SFN at p 7, para 29; p 20, para 74.

[17] Brief of the SFN at p 2, para 7; p 10, para 45; p 11, para 48; p 13, para 56.

19. It is not the SFN's duty to protect the interests of the Settlor.[18] The Trustees of the Trust have a fiduciary duty to protect the Settlor's intention. Additionally, the OPGT is also tasked with protecting the intention of the Settlor for the benefit of minor beneficiaries.

20. It is also not the SFN's duty to manage and safeguard the SFN's assets.[19] The assets of the Trust do not belong to the SFN or its members. Further, it is not within the Settlor's discretion to move the assets in the Trust.[20] It is the Trustee's discretion to manage and distribute the assets in the Trust. This is a fundamental misunderstanding by the SFN of the nature of the Trust and the legal and beneficial owners of the Trust's assets.

21. The Trust is a private trust. There is no constitutional element to this case,[21] and no challenge to the legislation. Further, a discriminatory definition of a beneficiary in a private trust is not a violation of the *Charter,*[22] nor does it violate any post-1985 legislation that came into effect following the creation of the Trust.[23] The legislation, and any changes to legislation including enfranchisement,[24] is irrelevant to the Trust as the Trust was not drafted to include post-creation changes in legislation.

22. The SFN's intervention as they propose to intervene in this limited scope legal question will certainly delay the proceedings by attempting to vastly expand the scope of the Threshold Question and lead expert evidence as the SFN is advising they are seeking to do.[25]

III. ISSUES

23. The Trustees submit that the following are the key questions before the Court:

    a. Should the SFN be granted intervenor status?

    b. If so, what is the scope of the SFN's intervention?

    c. The SFN should not be granted costs

    d. The SFN should not be permitted to adduce evidence

IV. LAW AND ARGUMENT

A. Should the SFN be granted Intervenor Status?

24. The Trustees do not dispute that the SFN is largely correct in the state of the law surrounding the grounds for being granted intervenor status. Rule 2.10 of the *Rules of Court* states that "on

[18] Brief of the SFN at p 2, para 7; p 12, para 54; p 13, para 56.

[19] Brief of the SFN at p 11, para 49; p 22, para 86.

[20] Brief of the SFN at p 12, para 55.

[21] Brief of the SFN at p 9, para 35.

[22] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. [**Authorities, TAB 1**]

[23] Brief of the SFN at p 17, para 65.

[24] Brief of the SFN at p 17, para 66 to p 19, para 72.

[25] Brief of the SFN at p 21, paras 78-79.

application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court."[26]

25. Providing additional commentary on intervening, the Alberta Court of Appeal has held:

> It may be fairly stated that, as a general principle, an intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court...[27]

26. This Court has established the test that, to be granted status, an intervenor ought to be capable of satisfying one of the four common law requirements of gaining intervenor status:[28]

    a. Will the proposed intervenor be specifically or directly affected by the decision of the Court;

    b. Will the proposed intervenor bring special expertise or insight to bear on the issues facing the Court;

    c. Are the proposed intervenor's interests at risk of not being fully protected or fully argued by one of the parties; and

    d. Will the intervenors presence provide the Court with fresh information or a fresh perspective on an issue?

27. Additionally, an intervention should be on a legal question which can be stated concretely, not vaguely.[29]

28. The Trustees do not dispute generally that the SFN meets the test for being granted intervenor status because it represents its members who may be impacted by the decision of the Court. However, the SFN is not specifically affected, and the scope of its intervention must be limited to the Threshold Question.

B. If granted, what is the scope of the Intervention?

1. The SFN's intervention ought to be restricted to the Threshold Question only

29. The only matter currently scheduled to be heard before the Court is the Threshold Question. The Threshold Question has been defined by case management order to be restricted to point 1(b) of the Full Application - whether the Trustees are able to distribute under this discriminatory Trust.[30] Accordingly, the only matter which is to be heard by the Court, and the issue in which the SFN seeks intervenor status, is this purely legal question.

30. The SFN may argue that being granted intervention on the Full Application would be more efficient. With respect, the Trustees disagree. It is impossible to determine what will happen after the Threshold Question is answered by the Court. To date, this litigation has largely proceeded on an

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[26] *Alberta Rules of Court*, Alta Reg 124/2010, at R. 2.10. [**Authorities, TAB 2**]

[27] *Papaschase Indian Band v Canada (Attorney General)*, 2005 ABCA 320 ("*Papaschase*") at 2. [**Authorities, TAB 3**]

[28] *Suncor Energy Inc v Unifor Local 707 A*, 2014 ABQB 555 at 8. [**Authorities, TAB 4**]

[29] *University of Alberta v Alberta (Information and Privacy Commissioner)*, 2011 ABQB 389 ("*U of A v Alberta*"). [**Authorities, TAB 5**]

[30] This case management order was consented to by counsel for the SFN.

issue-by-issue basis; there is a well-established pattern of addressing one issue at a time before moving to the next. There have been discrete Orders, for example, holding the Trust is discriminatory, or that the Asset Transfer as between Trusts was valid. Restricting the scope of the Threshold Question is well within keeping of the procedural flow of this litigation.

31. Notwithstanding that the SFN does not state its intended position with respect to the Threshold Question, the Trustees do not oppose that the SFN be granted intervenor status on this legal issue of distributing under this discriminatory Trust.

32. However, pursuant to the Courts' inherent authority to do so, certain terms and conditions should be imposed on any intervenor to ensure the Threshold Question proceeds in the most efficient way possible. Considering that the underlying Advice and Direction Application is already well advanced, the Trustees propose that any intervenor should only be allowed to participate in submissions related to the Threshold Question, and they be precluded from any other arguments including hijacking the Application to declare the Trust invalid and taking control of the assets. Any intervenor must be limited to arguing in respect of the remedies sought by the parties, which, in this case is to answer a strict legal question. An intervenor is not permitted to seek remedial or proprietary relief.

2. The SFN ought not to be entitled to lead new evidence or reframe and define the issues

33. The Courts have been clear that intervenors' participation in an action is inherently limited in scope; there should be no intervention on a factual question, nor should an intervenor be permitted to raise fresh issues or adduce additional evidence.[31]

34. The intervener has to take the cases as they find it, and cannot argue new issues or raise new evidence thus prejudicing existing parties. Interventions are limited to existing issues raised by parties:

> Alberta case law cautions that the scope of any intervention should be limited to only what is required for a court to make a proper determination on the issues before it… An intervenor should generally not be allowed to introduce new issues or enlarge the issues already before the court.[32]

35. The SFN seeks to introduce fresh evidence and new issues. In *Papaschase,* the Court, citing a decision of Federal Court, stated that the intervenor must take the case as they find it:

> "That said, it is clear as noted by the Federal Court of Appeal in *Canada (Minister of Indian & Northern Affairs) v. Corbiere* (1996), 199 N.R. 1 (Fed. C.A.) that ". . . an intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence."[33]

36. On an intervention motion, the proposed intervener must put its best foot forward, and should state its intended position:

> The court's ability to assess whether an intervener has something useful and different to add is tied to how clearly the intervener articulates the submissions they seek to advance. A bare assertion that

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[31] *Lameman v Canada (Attorney General)*, 2006 ABCA 43 at 5 ("*Lameman*"). [**Authorities, TAB 6**]

[32] *Auer v Auer*, 2018 ABQB 510 at 128, citing *R v Hirsekorn*, 2011 ABQB 156 at 21. [**Authorities, TAB 7**]

[33] *Papaschase*, *supra* note 27, at 3.

> one has a unique perspective is far less helpful than an overview of the arguments the intervener seeks to advance.[34]

37. To these ends, Courts may impose terms to manage intervention, or avoid overlap in arguments by different parties.[35]

38. At issue before the Court is the Threshold Question. As an Intervenor, the SFN is precluded from arguing new issues or adducing fresh evidence which prejudices the parties to the litigation, including the definition of beneficiaries, the scope of discrimination of the Trust, or the validity of the Trust itself.

3. The SFN ought not argue validity of the trust in the Threshold Question

39. The validity of the trust is not an issue that the Applicants have placed before the Court in the Threshold Question. The SFN ought therefore to refrain from raising these issues given the true nature of the question before the Court. In any event, the issues over invalidity raised by the SFN are without merit. The Trustees will briefly review the issues raised by SFN.

40. The three certainties required to declare an express private trust were famously set out in the landmark English trust law case *Knight v Knight*, which established the "three certainties" principle; for a trust to be valid, there must be:

    a. Certainty of intention: meaning the settlor must clearly intend to create a trust;

    b. Certainty of subject matter: the property involved must be clearly defined; and

    c. Certainty of objects: the beneficiaries must be identifiable.[36]

41. The Trust clearly is a valid trust, as it satisfies the requirements of the three certainties. The Settlor of the Trust (Chief Walter Twinn) had a clear intention to create a trust. This is evident in the trust deed and in the proceedings of the Trust for the last 40 years.

42. The SFN has, throughout their brief, stated either that they are the Settlor or that the Settlor had a clear intention to create a trust for the trust assets and the beneficiaries. While it is not correct that the Settlor of the Trust was the SFN, it is clear Chief Walter Twinn had an intention to create a trust in 1985.

43. The Trust holds significant assets. The SFN has admitted that the Trust holds assets that once belonged to the SFN.

44. The Trust can identify its beneficiaries. The Trustees have been clear through nearly 14 years of litigation that there are problems that need to be solved in identifying beneficiaries, in particular because of the definition of “beneficiary” is grounded in a now-replaced version of the *Indian Act*. However, at no point have the Trustees said identification of beneficiaries is impossible.

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[34] *JH v Alberta (Minister of Justice and Solicitor General)*, 2019 ABCA 420 at 19 (“*JH v Alberta*”). [**Authorities, TAB 8**]

[35] *U of A v Alberta*, *supra* note 29 at 28. [**Authorities, TAB 5**]

[36] *Knight v Knight* (1840) 49 ER 58. [**Authorities, TAB 9**]

45. Other parties to the litigation have repeatedly agreed that the beneficiaries are identifiable, and the SFN has also admitted that they have been able to identify beneficiaries and determined that a percentage of the beneficiaries are not members of the SFN. They have also stated that the Court has been able to identify beneficiaries.

46. It is also clear that it is not necessary to determine with certainty all the beneficiaries as was determined in *McPhail v Dalton*,[37] cited with approval in many Canadian cases. If beneficiaries can be identified then the trust is valid. The SFN in its brief has identified beneficiaries and the court has identified beneficiaries.

47. Specifically, in *McPhail*, the Court found, while it was not possible to draw up a complete list of all the members of the class, this did not make the trust invalid for a lack of certainty. Rather, the court held that certainty merely requires whether a court could say with certainty that a given individual was a member of a class. Provided a given description of beneficiaries is conceptually clear, the difficulty of assessing whether a person satisfies the description will not weigh against certainty. In each case the exact words must be scrutinized, but once class is determined as being conceptually certain the matter of whether a beneficiary is included is a question of fact, not law.[38]

48. *McPhail* has been cited favourably in Alberta Courts specifically. In *Wood and Whitebread v R*, the Court states:

> The requirement of certainty under a power or a trust is discussed and equated by the House of Lords in *McPhail v. Doulton*, [1971] A.C. 424, [1970] 2 All E.R. 228. This case was applied by the Supreme Court of Canada in *Jones v. T. Eaton Co.*, *supra*. In both cases the courts were concerned with "certainty" in terms of determining the persons entitled. The House of Lords and the Supreme Court of Canada adopted as a test the following, at p. 456:
>
> > ...the trust is valid if it can be said with certainty that any given individual is or is not a member of the class.
> >
> > Lord Wilberforce quotes with approval a test found in the Restatement of Trusts, 2d. ed., (1959) s. 122:
> >
> > ...the class must not be so indefinite that it cannot be ascertained whether any person falls within it.
>
> Modifying the first-quoted test to relate to "purposes", I do not think it can be said within a certainty that any given use would qualify. I do note that Lord Wilberforce says that difficulty in ascertaining the existence or whereabouts of members of the class could be dealt with on an application for directions.[39]

49. The SFN further argues that the Trust should be voided for public policy reasons which is clearly not before the Court in the Threshold Question.[40] The SFN should not be permitted to bring this fresh issue into this Application. The SFN cites the case *McCorkill v Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased* in suggesting that the Trust may not be capable of being lawfully administered and distributed to its beneficiaries based on public policy concerns.[41] With respect, this case is distinguishable and not applicable.

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[37] *McPhail v Dalton* 1971 AC 424 ("*McPhail*"). [**Authorities, TAB 10**]

[38] *Ibid*; cited in *Jones v T Eaton Co*, [1973] SCR 635 at para 35, 35 DLR (3d) 97 [**Authorities, TAB 11**]; *Wood and Whitebread v R*, [1977] 6 WWR 273 (ABSC) at para 32, 9 AR 427 [**Authorities, TAB 12**]; and *Lewis v Union of BC Performers* [1996] 6 WWR 588 (BCSC) at para 29, 1996 CarswellBC 160. [**Authorities, TAB 13**].

[39] *Wood and Whitebread v R*, *ibid* at 32. [**Authorities, TAB 12**]

[40] Brief of the SFN at p 10, paras 40-43.

[41] *McCorkill v Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased*, 2014 NBQB 148 ("*McCorkill*"). [**Authorities, TAB 14**]

50. In *McCorkill*, the deceased, Harry Robert McCorkill, left the balance of his estate to the National Alliance, a neo-Nazi group which was active in disseminating hate propaganda and inciting hatred contrary to the *Criminal Code* of Canada.[42] The Court found that any bequest to the National Alliance should be voided based on the deplorable and criminal character of this beneficiary.[43] The court in McCorkill specifically addressed that it was a unique case that would have limited applicability in the future

51. This public policy issue is not before the Court at this time but may be before that Court when the Court hears the Full Application. Based on the law cited above, an intervenor should not be permitted to dictate the issues it wishes to argue nor dictate the order in which the issues will be argued. The Trustees have the right to put their issue in the Threshold Question before the Court and seek advice and direction on the issue. An intervenor can address the question put before the Court and nothing more.

4. The SFN ought not to be awarded costs of intervening

52. Should this Court grant the SFN intervenor status on the Threshold Question, any such Order ought to direct that the SFN bear their own costs to participate. Intervenors typically are responsible for paying their own costs, with only very narrow exceptions.[44]

53. Previous Orders granting the SFN intervenor status in this matter have not awarded costs; these include the October 31, 2019 Order of Justice Henderson and the May 5, 2022 Order of Justice Khullar (as she then was).

V. CONCLUSION

54. The Trustees seek the Order attached as “TAB C” be granted.

[42] *McCorkill, ibid* at 50 and 56.

[43] See, for example, *Papaschase*, *supra* note 27 at 14 [**Authorities, TAB 3**]; *JH v Alberta*, *supra* note 34 at 29 [**Authorities, TAB 8**]; *R v Hirsekorn*, 2011 ABQB 156 at 25 [**Authorities, TAB 15**].

VI. APPENDIX OF MATERIALS

TAB	
A	Full Application for Case Management, filed June 28, 2024.
B	Case Management Order of Justice J.S. Little, filed January 11, 2025
C	Proposed Form of Order for Scope of Intervention
D	Consent Order (Issue of Discrimination) of Justice D.R.G. Thomas, filed January 22, 2018

VIII. AUTHORITIES

1	*Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11
2	Alberta *Rules of Court*, Alta Reg 124/2010
3	*Papaschase Indian Band v Canada (Attorney General)*, 2005 ABCA 320
4	*Suncor Energy Inc v Unifor Local 707 A*, 2014 ABQB 555
5	*University of Alberta v Alberta (Information and Privacy Commissioner)*, 2011 ABQB 389
6	*Lameman v Canada (Attorney General)*, 2006 ABCA 43
7	*Auer v Auer,* 2018 ABQB 510
8	*JH v Alberta (Minister of Justice and Solicitor General)*, 2019 ABCA 420
9	*Knight v Knight* (1840) 49 ER 58
10	*McPhail v Dalton* 1971 AC 424
11	*Jones v T Eaton Co*, [1973] SCR 635
12	*Wood and Whitebread v R*, [1977] 6 WWR 273 (ABSC)
13	*Lewis v Union of BC Performers* [1996] 6 WWR 588 (BCCA)
14	*McCorkill v Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased*, 2014 NBQB 148
15	*R v Hirsekorn,* 2011 ABQB 156

Form 27
Rule 6.3

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANT	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**APPLICATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2500 Stantec Tower 10230 – 103 Avenue Edmonton, AB T5J 0K4 Attention: Michael S Sestito Telephone: (780) 423-7300 Email: Michael.sestito@dentons.com File No: 551860-001-MSS

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
Jun 28, 2024
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by Email
CLERK OF THE COURT

NOTICE TO RESPONDENT(S)

This application is made against you. You are a respondent. You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date:	**To be Scheduled before Case Management Justice**
Time:	**To be Scheduled before Case Management Justice**
Where:	**Law Courts, 1A Sir Winston Churchill Square, Edmonton, Alberta T5J 0R2**

Before Whom: **Justice J.S. Little**

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. An Order setting out the following:

    a. Confirming the validity of the 1985 Sawridge Trust;

    b. Affirming that notwithstanding that the definition of "Beneficiary" set out under the 1985 Sawridge Trust is discriminatory, and includes certain non-members of the Sawridge Nation, the Sawridge Trustees may proceed to make distributions to the Beneficiaries of the 1985 Sawridge Trust, including to non-members of the Sawridge First Nation who qualify as beneficiaries of the 1985 Sawridge Trust;

    c. Approving the Distribution Proposal submitted by the Sawridge Trustees;

    d. Confirming that the Office of the Public Guardian and Trustee has fully executed and satisfied its obligations, as of the date this Order is filed, imposed upon them by this Court;

    e. Discharging the Office of the Public Guardian and Trustee from any further duties in relation to this Action;

    f. Declaring that the indemnification and funding of the Office of the Public Guardian and Trustee, as set out in the Order of Justice Thomas, pronounced June 12, 2012, and filed September 20, 2012, is ended; and

    g. Confirming that the litigation has concluded and that nothing in the Order negates the Sawridge Trustees' ongoing duty to act in good faith in carrying out their duties and powers as defined in the 1985 Sawridge Trust, or the Beneficiaries' ongoing right to enforce the bona fides of the Sawridge Trustees in the exercise of their powers and duties as outlined in the 1985 Sawridge Trust Deed.

Grounds for making this application:

2. In 2011, the Sawridge Trustees brought an application for advice and direction to the court seeking certain relief.

3. In 2012, the OPGT was appointed litigation representative for the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation.

4. In 2015, the Court ordered the Trustees to present a distribution proposal and have it approved by the Court.

5. Also in 2015, the Court Ordered the OPGT to limit its role to four tasks:

    a. Representing the interests of minor beneficiaries and potential minor beneficiaries to ensure that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust; and

    b. Examining on behalf of the minor beneficiaries the manner in which the property was placed / settled in the Trust; and

    c. Identifying potential but not yet identified minors who are children of Sawridge First Nation members or membership candidates as these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

    d. Supervising the distribution process itself.

6. In 2016, the application concerning the 1985 Sawridge Trust distribution proposal was adjourned *sine die*. The issue of the distribution proposal remains outstanding.

7. The Sawridge Trustees wish to begin distributing benefits to the 1985 Sawridge Beneficiaries.

8. The Sawridge Trustees have prepared a draft distribution proposal and have shared that draft with the parties.

Material or evidence to be relied on:

9. The Distribution Proposal of the Sawridge Trustees;
10. Affidavits previously filed in this action;
11. Questionings filed in this action;
12. Undertakings filed in this action;
13. Affidavits of records and supplemental affidavits of records in this action;
14. Such further material as counsel may further advise and this Honourable Court may permit.

Applicable rules:

15. *Alberta Rules of Court,* Alta Reg 124/2010, Rules 1.2, 1.3, 1.4, 4.11, 4.14, 6.3,
16. Such further and other rules as counsel may advise and this Honourable Court may permit.

Applicable Acts, regulations and Orders:

17. *Trustee Act,* SA 2022, c T-8.1, as amended;
18. Various procedural orders made in the within action;
19. Such further and other acts, regulations, and orders as counsel may advise and this Honourable Court may permit.

Any irregularity complained of or objection relied on:

20. None.

How the application is proposed to be heard or considered:

21. In person before the Case Management Justice.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

COURT FILE NUMBER	1103 14112
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, AS AMENDED and IN THE MATTER OF THE SAWRIDGE BAND *INTER VIVOS* SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN, AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**CASE MANAGEMENT ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**DENTONS CANADA LLP** **Attn: Michael Sestito** 2500 Stantec Tower 10220 – 103 Avenue NW Edmonton, AB T5J 0K4 Phone: 780-423-7300 Email: michael.sestito@dentons.com File: 551860-1/MSS

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
Jan 11, 2025
jh
by Email
CLERK OF THE COURT

ENT

DATE THIS ORDER WAS PRONOUNCED: November 27, 2024

PLACE WHERE THIS ORDER WAS PRONOUNCED: Edmonton, Alberta

NAME OF JUSTICE WHO PRONOUNCED THIS ORDER: Justice J.S. Little

UPON the Case Management meeting; AND UPON review of an application for intervention status provided by the Sawridge First Nation (the "**Intervention Application**"); AND UPON hearing the submissions from counsel for the Sawridge Trustees, the Office of the Public Guardian and Trustee ("**OPGT**"), and the Sawridge First Nation; AND UPON hearing from Catherine Twinn who is self represented; AND UPON noting the Application from the Sawridge Trustees for certain relief filed June 28, 2024 (the "**Full Application**"); AND UPON being informed by the Sawridge Trustees that they wish to have the court adjudicate the threshold issue regarding paragraph 1(b) of the Full Application before the balance of the application is considered (the "**Threshold Application**"); AND UPON having heard from those noted above with respect to the timing of the Intervention Application and the Threshold Application;

IT IS HEREBY ORDERED THAT:

1. The Intervention Application shall be scheduled for a half day on April 4, ~~2024~~; 2025

2. The Sawridge First Nation, as Applicants in the Intervention Application, shall provide its brief on or before February 14, 2025;

3. The Respondents shall provide written briefs responding to the Intervention Application on or before March 14, 2025;

4. The Threshold Application shall be scheduled for a full day on June 16, 2025;

5. The Sawridge Trustees, as Applicants, shall file their written brief regarding the Threshold Application on April 16, 2025;

6. The Respondents shall provide written briefs responding to the Threshold Application on or before May 26, 2025; and,

7. Following the release of the decision regarding the Intervention Application, the parties and the Sawridge First Nation, should they be granted status as an intervenor, may contact the Court and the other parties, to request modification of the timetable for the Threshold Application.

COURT OF KING'S BENCH OF ALBERTA

Justice J.S. Little

APPROVED AS TO FORM AND CONTENT BY:

KPMG LAW LLP / DENTONS CANADA LLP

Doris C Bonora KC / Michael Sestito,
Co-Counsel for the Sawridge Trustees

CATHERINE TWINN

Catherine Twinn, Self-Represented

HUTCHISON LAW / FIELD LAW

P. Jonathan Faulds KC / Janet Hutchison,
Co-Counsel for the OPGT

MCLENNAN ROSS LLP

Crista Osualdini, Counsel for the Sawridge First Nation

2. The Sawridge First Nation, as Applicants in the Intervention Application, shall provide its brief on or before February 14, 2025;

3. The Respondents shall provide written briefs responding to the Intervention Application on or before March 14, 2025;

4. The Threshold Application shall be scheduled for a full day on June 16, 2025;

5. The Sawridge Trustees, as Applicants, shall file their written brief regarding the Threshold Application on April 16, 2025;

6. The Respondents shall provide written briefs responding to the Threshold Application on or before May 26, 2025; and,

7. Following the release of the decision regarding the Intervention Application, the parties and the Sawridge First Nation, should they be granted status as an intervenor, may contact the Court and the other parties, to request modification of the timetable for the Threshold Application.

COURT OF KING'S BENCH OF ALBERTA

_____
Justice J.S. Little

APPROVED AS TO FORM AND CONTENT BY:

KPMG LAW LLP / DENTONS CANADA LLP

_____
Doris C Bonora KC / Michael Sestito,
Co-Counsel for the Sawridge
Trustees

CATHERINE TWINN

_____
Catherine Twinn, Self-Represented

HUTCHISON LAW / FIELD LAW

_____
P. Jonathan Faulds KC / Janet Hutchison,
Co-Counsel for the OPGT

MCLENNAN ROSS LLP

_____
Crista Osualdini, Counsel for the
Sawridge First Nation

COURT FILE NUMBER	1103 14112
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, AS AMENDED and IN THE MATTER OF THE SAWRIDGE BAND *INTER VIVOS* SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN, AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**CASE MANAGEMENT ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**DENTONS CANADA LLP** **Attn: Michael Sestito** 2500 Stantec Tower 10220 – 103 Avenue NW Edmonton, AB T5J 0K4 Phone: 780-423-7300 Email: michael.sestito@dentons.com File: 551860-1/MSS And Doris Bonora KC Email : dorisbonora@kpmg.ca

Clerk's Stamp

DATE THIS ORDER WAS PRONOUNCED: _____

PLACE WHERE THIS ORDER WAS PRONOUNCED: **Edmonton, Alberta**

NAME OF JUSTICE WHO PRONOUNCED THIS ORDER: **Justice J.S. Little**

UPON the Case Management Order pronounced November 27, 2024 (the "Case Management Order"); AND UPON review of an application for intervention status provided by the Sawridge First Nation (the "**Intervention Application**"); AND UPON hearing the submissions from counsel for the Sawridge Trustees, the Office of the Public Guardian and Trustee ("**OPGT**"), and the Sawridge First Nation; AND UPON hearing submissions from Catherine Twinn; AND UPON the Application from the Sawridge Trustees for certain relief filed June 28, 2024 (the "**Full Application**"); AND UPON being informed by the Sawridge Trustees that they wish to have the court adjudicate the threshold issue regarding paragraph 1(b) of the Full Application before the balance of the application is considered (the "**Threshold Application**"); AND UPON noting the consent from those noted below with respect to the within order

IT IS HEREBY ORDERED THAT:

1. The Sawridge First Nation is granted status to intervene on the Threshold Application on the following conditions:

    a. The Sawridge First Nation may file a written brief of law on or before May 26, 2025, of no more than 20 pages limited to arguments relating to the Threshold Application;

    b. The Sawridge First Nation may be entitled to provide oral argument of no more than 45 minutes, or such further time as the court may allow limited to arguments relating to the Threshold Application;

    c. The Sawridge First Nation shall not be permitted to adduce any new evidence;

    d. The Sawridge First Nation may not raise new issues in the Threshold application and may not raise issues that are not raised by the Applicants; and,

    e. The Sawridge First Nation shall bear its own costs both for the purposes of its Intervention Application and for any participation in the Threshold Application.

2. The Sawridge First Nation's participation in any other part of the Full Application may be determined by consent of the Parties, failing which the Sawridge First Nation may apply for intervention at a later day.

3. The Threshold Application is scheduled for a full day on June 16, 2025. The Sawridge Trustees, as Applicants, shall file their written brief regarding the Threshold Application on April 16, 2025. The Respondents and the Sawridge First Nation shall provide written briefs responding to the Threshold Application on or before May 26, 2025.

COURT OF KING'S BENCH OF ALBERTA

Justice J.S. Little

APPROVED AS TO FORM AND CONTENT BY:

KPMG LAW LLP / DENTONS CANADA LLP

Doris C Bonora KC / Michael Sestito,
Co-Counsel for the Sawridge
Trustees

CATHERINE TWINN

Catherine Twinn, Self-Represented

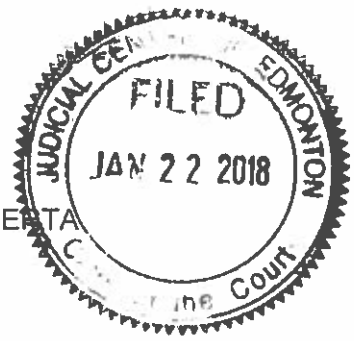
HUTCHISON LAW / FIELD LAW

MCLENNAN ROSS LLP

P. Jonathan Faulds KC / Janet Hutchison,
Co-Counsel for the OPGT

Crista Osualdini, Counsel for the
Sawridge First Nation

Clerk's stamp:



COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and the SAWRIDGE TRUST ("Sawridge Trust")

APPLICANT	ROLAND TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO AND WALTER FELIX TWIN, as Trustees for the 1985 Trust and the 1986 Trust ("Sawridge Trustees")
DOCUMENT	**CONSENT ORDER (ISSUE OF DISCRIMINATION)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5

JUSTICE: D.R.C. THOMAS
DATE: JAN 19, 2018
LOCATION: EDMONTON

Attention: Doris C.E. Bonora
Telephone: (780) 423-7100
Fax: (780) 423-7276
File No: 551860-001-DCEB

I hereby certify this to be a true copy of the original.

for Clerk of the Court

UPON the Application by the Sawridge Trustees for advice and direction in respect of the Sawridge Band Inter Vivos Settlement ("1985 Trust"), for which an Application for Advice and Direction was filed January 9th, 2018;

AND WHEREAS the first question in the Application by the Sawridge Trustees on which direction is sought is whether the definition of "Beneficiary" in the 1985 Trust is discriminatory, which definition reads:

> "Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed

all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement;

AND UPON being advised that the parties have agreed to resolve this specific question on the terms herein, and no other issue or question is raised before the Court at this time, including any question of the validity of the 1985 Trust;

AND UPON being advised the Parties remain committed to finding a remedy that will protect the existence of the 1985 Trust and the interests of the beneficiaries;

AND UPON there being a number of other issues in the Application that remain to be resolved, including the appropriate relief, and upon being advised that the parties wish to reserve and adjourn the determination of the nature of the relief with respect to the discrimination;

AND UPON this Court having the authority to facilitate such resolution of some of the issues raised in the Application prior to the determination of the balance of the Application;

AND UPON noting the consent of the Sawridge Trustees, consent of The Office of the Public Trustee and Guardian of Alberta ("OPGT") and the consent of Catherine Twinn;

IT IS HEREBY ORDERED AND DECLARED;

1. The definition of "Beneficiary" in the 1985 Trust is declared to be discriminatory insofar as it prohibits persons who are members of the Sawridge Indian Band No. 19 pursuant to the amendments to the *Indian Act* made after April 15, 1982 from being beneficiaries of the 1985 Trust.

2. The remaining issues in the Application, including the determination of any remedy in respect of this discriminatory definition, are to be the subject of a separate hearing. The timeline for this hearing will be as set out in Schedule "A" hereto and may be further determined at a future Case Management Meeting.

3. The Justice who hears and determines the remaining issues in this Application may consider all forms of discrimination in determining the appropriate relief.

4. Nothing in this order may be construed to be a determination that the 1985 Trust is void or otherwise invalid. This Consent Order cannot be used in an application for dissolution as ~~the sole determinative factor that~~ a ground upon which the 1985 Trust ~~should~~ could be dissolved.

5. ~~The provisions in paragraph 4, above, will not prevent reliance on this Consent Order for any purpose in the within proceedings.~~

The Honourable D. R. G. Thomas

CONSENTED TO BY:

MCLENNAN ROSS LLP

Karen Platten, Q.C.
Counsel for Catherine Twinn as Trustee for the 1985 Trust

HUTCHISON LAW

Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

SCHEDULE "A"

Clerk's stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and the SAWRIDGE TRUST ("Sawridge Trust")
APPLICANT	ROLAND TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO AND WALTER FELIX TWIN, as Trustees for the 1985 Trust and the 1986 Trust ("Sawridge Trustees")
DOCUMENT	**Litigation Plan January 19, 2018**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

1. The remaining steps and procedures are to be completed on or before the dates specified below:

NO.	ACTION	DEADLINE
1.	Case Management Meeting to address Trustee's application for an Order on the Discrimination Issue.	January 19, 2018
2.	Settlement meeting of all counsel for the Parties to continue to discuss remedies;	February 14, 15 or 16, 2018
3.	Interim payment on accounts made to OPGT from the Trustees	January 31, 2018 and February 28, 2018
4.	Agreed Statement of Facts to be circulated to all Parties, by the Trustees on the issue of the determination of the definition of beneficiary and grandfathering (if any).	By February 28, 2018
5.	Further Settlement meeting of all counsel for the Parties to continue to discuss remedies and draft Agreed Statement of Facts.	By March 30, 2018
6.	Responses from the Trustees to the OPGT regarding all outstanding issues on accounts to the end of 2017	March 30, 2018
7.	All Parties to provide preliminary comments on the Trustee's first draft of an Agreed Statement of Facts.	By May30, 2018
8.	Concurrently with the preparation of the agreed statement of facts, all Parties to advise on whether they have any documents on which they respectively intend to rely on the issue of the remedies. If they have documents, they will file an Affidavit of Records	By ~~February 28~~, 2018 April 30
9.	Concurrently with the preparation of the agreed statement of facts, all non-parties may provide records on which they intend to rely to all Parties who will determine if they are duplicates and if not, non party may file an Affidavit of Records	By February 28, 2018
10.	Third 2018 Settlement Meeting of all counsel to continue to discuss remedies and draft Agreed Statement of Facts.	By April 30, 2018
11.	Questioning on new documents only in Affidavits of Records filed, if required.	By ~~May 30~~, 2018 June 15
12.	Non-party potential beneficiaries provide all Parties with any facts they wish to insert in the Agreed Statement of Facts.	By April 30, 2018

13.	Final Response by OPGT and any other recognized party on Agreed Statement of Facts.	By June 30, 2018
14.	Agreed Statement of Facts filed, if agreement reached.	By July 15, 2018
15.	Parties to submit Consent Order proposing revised Litigation Plan including a procedure for the remainder of the application including remedy for striking language or amending the trust under section 42 of the Trustee Act or amending the trust according to the trust deed. Alternatively, Trustees to file application re: same.	By July 15, 2018
16.	All other steps to be determined in a case management hearing	As and when necessary

CONSTITUTION ACT, 1982[(81)]

PART I

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Democratic Rights

Democratic rights of citizens

3 Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4 (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.[(82)]

LOI CONSTITUTIONNELLE DE 1982[(81)]

PARTIE I

Charte canadienne des droits et libertés

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

Garantie des droits et libertés

Droits et libertés au Canada

1 La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Libertés fondamentales

Libertés fondamentales

2 Chacun a les libertés fondamentales suivantes :

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

c) liberté de réunion pacifique;

d) liberté d'association.

Droits démocratiques

Droits démocratiques des citoyens

3 Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

Mandat maximal des assemblées

4 (1) Le mandat maximal de la Chambre des communes et des assemblées législatives est de cinq ans à compter de la date fixée pour le retour des brefs relatifs aux élections générales correspondantes.[(82)]

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.[83]

Annual sitting of legislative bodies

5 There shall be a sitting of Parliament and of each legislature at least once every twelve months.[84]

Mobility Rights

Mobility of citizens

6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Prolongations spéciales

(2) Le mandat de la Chambre des communes ou celui d'une assemblée législative peut être prolongé respectivement par le Parlement ou par la législature en question au-delà de cinq ans en cas de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, pourvu que cette prolongation ne fasse pas l'objet d'une opposition exprimée par les voix de plus du tiers des députés de la Chambre des communes ou de l'assemblée législative.[83]

Séance annuelle

5 Le Parlement et les législatures tiennent une séance au moins une fois tous les douze mois.[84]

Liberté de circulation et d'établissement

Liberté de circulation

6 (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.

Liberté d'établissement

(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit :

a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;

b) de gagner leur vie dans toute province.

Restriction

(3) Les droits mentionnés au paragraphe (2) sont subordonnés :

a) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle;

b) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics.

Programmes de promotion sociale

(4) Les paragraphes (2) et (3) n'ont pas pour objet d'interdire les lois, programmes ou activités destinés à améliorer, dans une province, la situation d'individus défavorisés socialement ou économiquement, si le taux d'emploi dans la province est inférieur à la moyenne nationale.

Legal Rights

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8 Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9 Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10 Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11 Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it

Garanties juridiques

Vie, liberté et sécurité

7 Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Fouilles, perquisitions ou saisies

8 Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

Détention ou emprisonnement

9 Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

Arrestation ou détention

10 Chacun a le droit, en cas d'arrestation ou de détention :

a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;

b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;

c) de faire contrôler, par *habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

Affaires criminelles et pénales

11 Tout inculpé a le droit :

a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;

b) d'être jugé dans un délai raisonnable;

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;

f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;

h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

Treatment or punishment

12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Cruauté

12 Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

Self-crimination

13 A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Témoignage incriminant

13 Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

Interpreter

14 A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Interprète

14 La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.

Equality Rights

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or

Droits à l'égalité

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15 (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe,

ethnic origin, colour, religion, sex, age or mental or physical disability.(85)

Official Languages of Canada

Official languages of Canada

16 (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.(86)

Proceedings of Parliament

17 (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.(87)

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.(88)

Parliamentary statutes and records

18 (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.(89)

de leur âge ou de leurs déficiences mentales ou physiques.(85)

Langues officielles du Canada

Langues officielles du Canada

16 (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

Langues officielles du Nouveau-Brunswick

(2) Le français et l'anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick.

Progression vers l'égalité

(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

Communautés linguistiques française et anglaise du Nouveau-Brunswick

16.1 (1) La communauté linguistique française et la communauté linguistique anglaise du Nouveau-Brunswick ont un statut et des droits et privilèges égaux, notamment le droit à des institutions d'enseignement distinctes et aux institutions culturelles distinctes nécessaires à leur protection et à leur promotion.

Rôle de la législature et du gouvernement du Nouveau-Brunswick

(2) Le rôle de la législature et du gouvernement du Nouveau-Brunswick de protéger et de promouvoir le statut, les droits et les privilèges visés au paragraphe (1) est confirmé.(86)

Travaux du Parlement

17 (1) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux du Parlement.(87)

Travaux de la Législature du Nouveau-Brunswick

(2) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux de la Législature du Nouveau-Brunswick.(88)

Documents parlementaires

18 (1) Les lois, les archives, les comptes rendus et les procès-verbaux du Parlement sont imprimés et publiés en français et en anglais, les deux versions des lois ayant

également force de loi et celles des autres documents ayant même valeur.(89)

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.(90)

Documents de la Législature du Nouveau-Brunswick

(2) Les lois, les archives, les comptes rendus et les procès-verbaux de la Législature du Nouveau-Brunswick sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.(90)

Proceedings in courts established by Parliament

19 (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.(91)

Procédures devant les tribunaux établis par le Parlement

19 (1) Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux établis par le Parlement et dans tous les actes de procédure qui en découlent.(91)

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.(92)

Procédures devant les tribunaux du Nouveau-Brunswick

(2) Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux du Nouveau-Brunswick et dans tous les actes de procédure qui en découlent.(92)

Communications by public with federal institutions

20 (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications entre les administrés et les institutions fédérales

20 (1) Le public a, au Canada, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions du Parlement ou du gouvernement du Canada ou pour en recevoir les services; il a le même droit à l'égard de tout autre bureau de ces institutions là où, selon le cas :

a) l'emploi du français ou de l'anglais fait l'objet d'une demande importante;

b) l'emploi du français et de l'anglais se justifie par la vocation du bureau.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Communications entre les administrés et les institutions du Nouveau-Brunswick

(2) Le public a, au Nouveau-Brunswick, droit à l'emploi du français ou de l'anglais pour communiquer avec tout bureau des institutions de la législature ou du gouvernement ou pour en recevoir les services.

Continuation of existing constitutional provisions

21 Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.(93)

Maintien en vigueur de certaines dispositions

21 Les articles 16 à 20 n'ont pas pour effet, en ce qui a trait à la langue française ou anglaise ou à ces deux langues, de porter atteinte aux droits, privilèges ou obligations qui existent ou sont maintenus aux termes d'une autre disposition de la Constitution du Canada.(93)

Rights and privileges preserved

22 Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23 (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.(94)

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Droits préservés

22 Les articles 16 à 20 n'ont pas pour effet de porter atteinte aux droits et privilèges, antérieurs ou postérieurs à l'entrée en vigueur de la présente charte et découlant de la loi ou de la coutume, des langues autres que le français ou l'anglais.

Droits à l'instruction dans la langue de la minorité

Langue d'instruction

23 (1) Les citoyens canadiens :

a) dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de la province où ils résident,

b) qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou anglophone de la province,

ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue.(94)

Continuité d'emploi de la langue d'instruction

(2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

Justification par le nombre

(3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province :

a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité;

b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

Enforcement

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.[(95)]

Other rights and freedoms not affected by Charter

26 The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

27 This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29 Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the

Recours

Recours en cas d'atteinte aux droits et libertés

24 (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

Dispositions générales

Maintien des droits et libertés des autochtones

25 Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la proclamation royale du 7 octobre 1763;

b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.[(95)]

Maintien des autres droits et libertés

26 Le fait que la présente charte garantit certains droits et libertés ne constitue pas une négation des autres droits ou libertés qui existent au Canada.

Maintien du patrimoine culturel

27 Toute interprétation de la présente charte doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.

Égalité de garantie des droits pour les deux sexes

28 Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

Maintien des droits relatifs à certaines écoles

29 Les dispositions de la présente charte ne portent pas atteinte aux droits ou privilèges garantis en vertu de la

Constitution of Canada in respect of denominational, separate or dissentient schools.[96]

Application to territories and territorial authorities

30 A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended

31 Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Constitution du Canada concernant les écoles séparées et autres écoles confessionnelles.[96]

Application aux territoires

30 Dans la présente charte, les dispositions qui visent les provinces, leur législature ou leur assemblée législative visent également le territoire du Yukon, les territoires du Nord-Ouest ou leurs autorités législatives compétentes.

Non-élargissement des compétences législatives

31 La présente charte n'élargit pas les compétences législatives de quelque organisme ou autorité que ce soit.

Application de la charte

Application de la charte

32 (1) La présente charte s'applique :

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Restriction

(2) Par dérogation au paragraphe (1), l'article 15 n'a d'effet que trois ans après l'entrée en vigueur du présent article.

Dérogation par déclaration expresse

33 (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

Effet de la dérogation

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

Durée de validité

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation

34 This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

Nouvelle adoption

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

Durée de validité

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

Titre

Titre

34 Titre de la présente partie : *Charte canadienne des droits et libertés*.

PART II

Rights of the Aboriginal Peoples of Canada

Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of *aboriginal peoples of Canada*

(2) In this Act, ***aboriginal peoples of Canada*** includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) ***treaty rights*** includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[(97)]

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the *Constitution Act, 1867*, to section 25 of this Act or to this Part,

PARTIE II

Droits des peuples autochtones du Canada

Confirmation des droits existants des peuples autochtones

35 (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Définition de *peuples autochtones du Canada*

(2) Dans la présente loi, ***peuples autochtones du Canada*** s'entend notamment des Indiens, des Inuit et des Métis du Canada.

Accords sur des revendications territoriales

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

Égalité de garantie des droits pour les deux sexes

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.[(97)]

Engagement relatif à la participation à une conférence constitutionnelle

35.1 Les gouvernements fédéral et provinciaux sont liés par l'engagement de principe selon lequel le premier ministre du Canada, avant toute modification de la catégorie 24 de l'article 91 de la *Loi constitutionnelle de 1867*, de l'article 25 de la présente loi ou de la présente partie :

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.(98)

a) convoquera une conférence constitutionnelle réunissant les premiers ministres provinciaux et lui-même et comportant à son ordre du jour la question du projet de modification;

b) invitera les représentants des peuples autochtones du Canada à participer aux travaux relatifs à cette question.(98)

PART III

Equalization and Regional Disparities

Commitment to promote equal opportunities

36 (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.(99)

PARTIE III

Péréquation et inégalités régionales

Engagements relatifs à l'égalité des chances

36 (1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à :

a) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;

b) favoriser le développement économique pour réduire l'inégalité des chances;

c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.

Engagement relatif aux services publics

(2) Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables.(99)

PART IV

Constitutional Conference

37 Repealed.(100)

PARTIE IV

Conférence constitutionnelle

37 Abrogé.(100)

PART IV.I

Constitutional Conferences

37.1 Repealed.(101)

PARTIE IV.1

Conférences constitutionnelles

37.1 Abrogé.(101)

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(2) If a certification order is obtained under the *Class Proceedings Act*, an action referred to in subrule (1) may be continued under that Act.

Amendments to pleadings in class proceedings

2.7 After a certification order is made under the *Class Proceedings Act*, a party may amend a pleading only with the Court's permission.

Information note

Rule 13.11 *[Pleadings: specific requirements for class proceedings]* describes how class proceedings must be titled.

Questioning of class and subclass members

2.8(1) If under section 18(2) of the *Class Proceedings Act* the Court requires a class member or subclass member to file and serve an affidavit of records, the Court may do either or both of the following:

(a) limit the purpose and scope of the records to be produced and of questioning;

(b) determine how the evidence obtained may be used.

(2) If a class member or subclass member is questioned under section 18(2) of the *Class Proceedings Act*, the Court may do either or both of the following:

(a) limit the purpose and scope of the questioning;

(b) determine how the evidence obtained may be used.

Information note

Section 18(2) of the *Class Proceedings Act* reads:

(2) After discovery of the representative plaintiff or, in a proceeding referred to in section 7, one or more of the representative plaintiffs, a defendant may, with leave of the Court, discover other class members or subclass members.

Class proceedings practice and procedure

2.9 Despite any other provision of these rules, the Court may order any practice and procedure it considers appropriate for a class proceeding under the *Class Proceedings Act* to achieve the objects of that Act.

Intervenor status

2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

Information note

The rules about making applications to the Court are in Part 6 *[Resolving Issues and Preserving Rights]* – see rule 6.3 *[Applications generally]*.

In the Court of Appeal of Alberta

Citation: Papaschase Indian Band (Descendants of) v. Canada (Attorney General), 2005 ABCA 320

Date: 20050930
Docket: 0403-0299-AC
Registry: Edmonton

Between:

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch, and Elsie Gladue on their own behalf and on behalf of all descendants of the Papaschase Indian Band No. 136

Respondents
(Appellants/Plaintiffs)

- and -

Attorney General of Canada

Respondent
(Respondent/Defendant)

- and -

Her Majesty the Queen in Right of Alberta

Respondent
(Respondent/Third Party)

- and -

Federation of Saskatchewan Indian Nations

Applicant
Proposed Intervener

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Madam Justice Anne Russell
The Honourable Madam Justice Ellen Picard

Memorandum of Judgment
Delivered from the Bench

Application for Leave to Intervene

Memorandum of Judgment
Delivered from the Bench

Fraser, C.J.A. (for the Court):

[1] This is an application for intervener status by the Federation of Saskatchewan Indian Nations (FSIN). The respondents in this application, Rose Lameman et al. (who are the appellants in the main action and are referred to herein as the "appellants"), support FSIN's application, but the application is opposed by the respondent, Canada. The respondent, Her Majesty the Queen in Right of Alberta, takes no position on this issue.

[2] It may be fairly stated that, as a general principle, an intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court. As explained by the Supreme Court of Canada in *R. v. Morgentaler*, [1993] 1 S.C.R. 462 at para. 1: "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."

[3] That said, it is clear as noted by the Federal Court of Appeal in *Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs* (1996), 199 N.R. 1 that ". . . an intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence."

[4] FSIN applies for intervener status on the basis that it represents 74 First Nations in Saskatchewan whose interests will be specially affected by the outcome of this appeal. It also claims expertise in the subject matters of the appeal. The FSIN's mandate is to enhance, protect and promote treaty and inherent rights of its member First Nations, and under its land and resource portfolio, the FSIN runs the Indian rights and treaties research program responsible for researching, preparing and submitting specific claims on behalf of Saskatchewan First Nations. FSIN points to this research work as an indication of the expertise that it has developed in a number of the issues facing this Court. As a result, FSIN proposes to make submissions as an intervener in support of the appellants on certain of those issues.

[5] A two-step approach is commonly used to determine an intervener application. The Court typically first considers the subject matter of the proceeding and second, determines the proposed intervener's interest in that subject matter. It is clear from reviewing the appellants' factum that there are three main issues on the appeal:

1. The tests for striking pleadings and summary judgment and, in particular, whether summary judgment is appropriate for resolution of complex evidentiary and novel legal issues based on aboriginal and treaty rights.

2. Whether the appellants lack standing to assert claims based on aboriginal and treaty rights because they are not a band. This, in turn, involves a number of potential issues including treaty rights under Treaty 6 and constitutional protection of treaty and aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.

3. To what extent, if any, provincial limitation periods can be invoked to extinguish aboriginal or treaty rights.

[6] In cases involving constitutional issues or which have a constitutional dimension to them, courts are generally more lenient in granting intervener status: *R. v. Trang*, [2002] 8 W.W.R. 755, 2002 ABQB 185 and *Alberta Sports & Recreation Assn. for the Blind v. Edmonton (City)*, [1994] 2 W.W.R. 659 (Alta. Q.B.). Similarly, appellate courts are more willing to consider intervener applications than courts of first instance. As noted by Hugessen J. in *First Nations of Saskatchewan v. Canada (A-G)*, 2002 FCT 1001 (T.D.):

> . . . [T]he test for allowing intervener standing for argument at the appellate level is necessarily different from that which is used at trial; trials must remain manageable and the parties must be able to define the issues and the evidence on which they will be decided. An appellate court on the other hand deals with a pre-established record that is not normally subject to change. And an appellate court, while benefiting from the different viewpoints expressed by interveners, is far better equipped to limit and control the length and nature of their interventions.

[7] In this case, in assessing the subject matter of the issues in dispute, we see two key issues on which it can be argued that the FSIN should be permitted to intervene. The first relates to whether provincial limitation periods can oust the protection afforded under s. 35(1) of the *Constitution Act, 1982* including whether other constitutional issues are therefore engaged. The second involves the issue of standing, that is whether the appellants have the standing to pursue their claim.

[8] The next step is to consider the FSIN's interest in the subject matter, which should be more than simply jurisprudential.

[9] In constitutional cases, if an applicant can show its interests will be affected by the outcome of the litigation, intervener status should be granted: *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161 (S.C.C.). Or, as already noted, if the intervener applicant possesses some expertise which might be of assistance to the court in resolving the issues before it, that too will do. As explained by Brian Crane in *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05, and approved by the Supreme Court of Canada in *Reference Re Workers' Compensation Act, 1983* (*Nfld*), [1989] 2 S.C.R. 335 at 340:

> an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue.

[10] In our view, for purposes of the subject appeal, the FSIN possesses some special expertise and insight that will assist this Court in determining the outcome of the appeal on certain issues. Having concluded that this is so, it is not necessary to consider whether some or all of FSIN's membership may be affected by the appeal. The test for intervention has been met.

[11] We are equally satisfied however that the grounds on which the FSIN should be permitted to intervene should properly be limited to the two key issues we have identified. Therefore, we grant intervener status to the FSIN.

[12] Dealing first with the limitations issue, the FSIN is permitted to file a factum and make oral submissions on provincial statutes of limitation and their relationship or application to treaty and aboriginal rights in light of treaty interpretation and s. 35(1) of the *Constitution Act, 1982*. With respect to the standing issue, the FSIN is permitted to file a factum and make oral submissions on whether the appellants have standing to pursue the subject claims. This includes addressing the status of First Nations not recognized as such whether because of alleged surrender of treaty rights or claimed amalgamations with other First Nations or otherwise.

(Discussion as to when factums are to be filed)

[13] The FSIN factums will be filed and served by the end of the day on October 31, 2005. The reply factums from each of Canada and Alberta are to be filed and served by the end of the day on November 23, 2005.

(Discussion as to costs)

[14] We order that each party and the intervener bear its own costs.

Appeal heard on September 22, 2005

Memorandum filed at Edmonton, Alberta
this 30th day of September, 2005

Fraser, C.J.A.

Appearances:

J. Tannahill-Marcano
for the Respondents (Rose Lameman et al.)

M.E. Annich
for the Respondent (Attorney General of Canada)

S. Latimer
for the Respondent (Canada)

D.N. Kruk
for the Respondent (Alberta)

M.J. Ouellette
for the Applicant Proposed Intervener (Federation of Saskatchewan Indian Nations)

Court of Queen's Bench of Alberta

Citation: Suncor Energy Inc v Unifor (Local 707 A), 2014 ABQB 555

Date: 20140908
Docket: 1401 03831
Registry: Calgary

Between:

Suncor Energy Inc.

Applicant

- and -

Unifor, Local 707 A

Respondent

Reasons for Judgment of the Honourable Chief Justice Neil Wittmann

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Introduction

[1] Unifor, Local 707 A ("the Union") and Suncor Energy Inc. ("the Employer"), are parties to a policy Grievance Arbitration, [2014] A.G.A.A. No. 6, with respect to the Random Alcohol and Drug Testing Policy ("the Policy") of the Employer. A three member panel decided by a majority that the Policy was an unreasonable exercise of the Employer's management rights and allowed the grievance. The Employer has sought judicial review in this Court and a hearing has been scheduled for October 23rd and 24th, 2014. The Applicants, the Mining Association of Canada ("MAC") and Enform Canada ("Enform") have sought leave to attain intervener status, jointly, in the judicial review application. The Union opposes this Court granting intervener

status to the Applicants. The Employer supports this Court granting intervener status to the Applicants.

Background

[2] The Random Alcohol and Drug Testing Policy Grievance Arbitration to be reviewed consists of 592 paragraphs without appendices. The dissent is 242 paragraphs.

[3] From that decision, it appears that alcohol and drug testing in the workplace takes on many forms including testing post-incident, testing upon reasonable grounds, testing as follow-up post rehabilitation and return to work testing. Collectively, it is common ground that this is "for cause" testing. Random testing is the issue in the Grievance Arbitration. At bottom, the parties seem to agree, supported by case authority, most recently, *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34, that the arbitration jurisprudence involves balancing safety in the workplace against privacy concerns. In the Grievance Arbitration, the majority relied heavily on *Irving Pulp & Paper*.

[4] MAC is a non-profit national organization purporting to be the voice of the Canadian mining and mineral processing industry. One of its top priorities is workplace safety. Enform is similarly a not for profit organization which promotes workplace safety in the upstream oil and gas industry. It is comprised of six trade associations representing different aspects of the upstream oil and gas industry. Those six associations are the Canadian Association of Petroleum Producers, the Petroleum Services Association of Canada, the Canadian Association of Oil Well Drilling Contractors, the Canadian Energy Pipeline Association, the Canadian Association of Geophysical Contractors, and the Explorers and Producers Association of Canada.

[5] The Applicants' written brief is replete with the safety objectives of their respective organizations.

[6] There appears to be no dispute that parts of the Union workplace in the oil sands may be classified as dangerous. A description of the activities performed, including the equipment used, its size, the number of incidents or accidents occurring, including deaths, seems to demonstrate danger. As will be briefly seen however, the issue is how dangerous, weighed against the privacy concerns or rights of the individuals who work there, who are members of the Union.

The Test for Intervener Status

[7] Although the *Alberta Rules of Court* ("ARC") in ARC 2.10 provide that a Court may grant status to a person to intervene subject to any terms and conditions and with the rights and privileges specified by the Court, no test is set forth to guide the Court in intervention applications. The common law governs.

[8] None of the parties disputes the test to guide judicial discretion. As set forth in the Applicants' brief, the considerations are as follows:

1. Will the proposed interveners be specially or directly affected by the decision of the Court: *Papaschase Indian Band v Canada (Attorney General)*, 2005 ABCA 320, [2005] AJ No 1273 at paragraph 2; *Knox v. Conservative Party of Canada*, 2007 ABCA 141 at paragraph 5; *Alberta (Minister of Justice) v Metis Settlements Appeals Tribunal*, 2005 ABCA 143 at paragraph 4; *R v Finta*, [1993] 1 SCR 1138 at 1143;

Carbon Development Partnership v Alberta (Energy and Utilities Board), 2007 ABCA 231, [2007] AJ No 727 at paragraph 10.

2. Will the proposed interveners bring special expertise or insight to bear on the issues facing the Court: *Papaschase* at paragraph 2; *Goudreau v Falher Consolidated School District No 69*, 1993 ABCA 72 at paragraph 17. This question is akin to whether an intervener would provide "fresh information or fresh perspective". *Reference Re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 SCR 335 at 340; *Stewart Estate (Re)*, 2014 ABCA 222 at paragraph 7.

3. Are the proposed interveners' interests at risk of not being fully protected or fully argued by one of the parties: *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 202 ABCA 243 at paragraph 2; *Gift Lake Metis Settlement v. Canadian Natural Resources Limited*, 2008 ABCA 391 at paragraph 6; Metis Settlements Appeal Tribunal at paragraph 4.

4. Will the interveners presence "provide the Court with fresh information or a fresh perspective on a constitutional or public issue" *Reference Re Workers' Compensation Act* at 340; *Papaschase* at paragraph 9.

Another factor is whether granting a right to intervene would unduly prejudice a party.

[9] Not surprisingly, although the parties and the proposed interveners agree on the factors articulated above, they disagree on the proper application of them.

Applying the Test

1. Specially or Directly Affected

[10] The Applicants say they are specially affected by the issue before the Court and have a direct material interest in making certain that the safety concerns presented by alcohol and drug use of employees, in high risk or safety sensitive industries, are addressed when determining the legality of random drug and alcohol testing. They reference not only a social and corporate responsibility, but also numerous regulatory statutes. The Applicants make the point that this Court's decision in the Judicial Review application will have a significant precedential effect on subsequent arbitrations and court cases dealing with random testing and therefore a significant impact on the Applicants' industries and interests.

[11] The Union says the Applicants do not have any special or direct interest and point out that it is insufficient for the proposed intervener to be simply "concerned about the effect of a decision" or "its precedential value": *Faculty7 Assn. of the University of British Columbia v University of British Columbia*, 2008 BCCA 376, [2008] BCJ No 1823 at paragraphs 9-10. They state that it must be more than "simply jurisprudential": *Papaschase* at paragraph 8. The Union points out that one arbitration board is not bound by the decision of another, even on a similar issue: *Camp Hill Hospital v Nova Scotia Nurses' Union* (1989), 66 DLR (4th) 711 (NSCA) at 714-715.

[12] On this issue, I accept that the Applicants have a special and direct interest. Their concerns and mandates include workplace safety in a dangerous workplace. The industries they represent and the associations involved include the Employer that will be before the Court, an oil

sands employer. While it may not be enough for an intervener to concern itself with the jurisprudential or precedential effect of a decision which directly affects them, if the implementation of the decision has direct ramifications for the Applicants' members, surely they have a direct and special interest, not necessarily in the specific outcome of the case, but in the proper balancing test that will be applied to determine whether a random alcohol and drug testing is allowed in any Applicants' workplace.

2. Special Expertise / Insight into the Issue

[13] The Applicants refer to MAC being permitted to intervene in a wide range of cases including those involving drug and alcohol testing. Enform, they say, has special expertise or insight with respect to the reasonableness of random drug and alcohol testing as part of broad risk mitigation. The Union says the Applicants have no special expertise, nor any fresh perspective. The Union argues because you say you have it doesn't make it so: *Morrow v Zhang*, 2008 ABCA 192, [2008] AJ No. 543 at paragraph 11. There, the Court stated that the special expertise or unique insight must be articulated so as to demonstrate the special expertise or fresh perspective which was not done in that case.

[14] During oral argument, the Applicants' counsel tendered the Employer's brief for the Judicial Review which was ordered filed by this Court approximately two months in advance of the hearings. The brief was provided to the Court without objection by the Union. It contains 133 pages plus appendices. Counsel for the Applicants referred to the index and indicated the Applicants have no intention of repeating arguments made in the Judicial Review by the Employer but rather wish to argue the broader perspective, from an industry standpoint, as to what *Irwin Pulp & Paper* actually decided in terms of how or what factors ought to be properly considered or weighed in balancing privacy interests against safety interests. The Union says that the only issue before the Judicial Review Court in this case will be whether the decision of the arbitration panel was reasonable. The Applicants, on the other hand, say that is only part of the issue, the other issue is whether the arbitration panel properly interpreted *Irwin Pulp & Paper* and then applied it reasonably. The Applicants say that it is not necessary to demonstrate a culture of substance abuse of drugs or alcohol in the workplace, or that workplace accidents have been caused by drug and alcohol abuse, according to *Irwin Pulp & Paper*. The deterrent effect of random drug and alcohol testing ought to be considered, say the Applicants, and there was evidence that was before the arbitration panel that was not taken into account.

[15] I am of the view that the Applicants will bring a special or fresh perspective to the issue before the Court and that this criterion has been satisfied.

3. Will the Proposed Interveners' Interests Be Fully Protected by the Employer and the Union

[16] The Applicants acknowledge that Suncor is fully invested in the Judicial Review to urge the Court that the grievance arbitration panel decision is unreasonable in light of the evidence presented before it. This criterion significantly overlaps with the concern expressed by the Applicants about the precedential value of the reasoning that this Court may arrive at including its interpretation of *Irving Pulp & Paper*. To the extent that the same concerns are present, the criteria has been satisfied. The Applicants' interests may not be fully protected by Suncor. The

proper application of *Irving Pulp & Paper* in the context of the Grievance Arbitration may engage a broader issue than reasonableness. This criterion is satisfied.

4. Constitutional and Public Interest Importance

[17] During oral argument, counsel for Suncor referenced the "quasi-constitutional" aspect of privacy interests. Counsel for the Applicants indicated, that in his view, there were no constitutional issues present. In the Grievance Arbitration, the majority at para 205, referred to *Irving Pulp & Paper* at para 23 in the context of individual privacy rights in Canada. The specific quote from *Irving Pulp & Paper* references the *Canadian Charter of Rights and Freedoms, R v Dyment* [1988] 2 SCR 417 at pp 431-432 and *R v. Soker* 2006 SCC 44. Both cases reference the highly intrusive nature of testing urine, blood or breath, the effect on human dignity and a need for standards and safeguards to meet constitutional requirements. For the purposes of this application, I accept the statement of Suncor's counsel, that the issue before the Judicial Review Court will involve "quasi-constitutional" issues in terms of the nature and importance of the privacy rights of an individual.

[18] With respect to the public interest, counsel for the Applicants stressed that the public has an interest in workplace safety as evidenced in regulatory and other statutes concerning the health and safety of not only workers who may have caused or contributed to workplace incidents or accidents, but also to others who may be affected. This includes other people in the workplace site, as well as health care workers and a vast array of health care and rehabilitation providers. Also involved, especially in an oil sands setting, is the protection of, and public interest in, the environment. Thus, from the constitutional and public interest dimensions, the underlying issue is important.

[19] Two other factors deserve mention in this case. In *Communications, Energy and Paper Workers Union, Local 707 v Suncor Energy Inc* 2012 ABQB 627, Macklin J, of this Court, granted an Interim Injunction prohibiting the Employer from implementing random drug and alcohol testing on the Union's members working in safety sensitive or specific positions. The new Policy was to be implemented October 15, 2012 and notification was given to the Union June 20, 2012. This decision was appealed. On the appeal, MAC was granted intervener status. All counsel were closely questioned as to whether there were Reasons from our Court of Appeal given for the granting of intervener status to MAC in this matter and counsel assured me that none were provided. The Union argued, somewhat aggressively, that the Court of Appeal's decision, found at 2012 ABCA 373 was rendered before the decision of the Supreme Court of Canada in *Irving Pulp & Paper*. Therefore, the Union argues that such intervener status would not have been granted had that case been decided before the Court of Appeal heard the appeal on the Interim Injunction. The Union says because *Irving Pulp & Paper* "settled" the law on the test for random drug and alcohol testing MAC would not have received intervener status.

[20] Finally, the Union argues that it will be severely prejudiced should intervener status be granted to the Applicants. When pressed in oral argument why this was so, the Union said that it would "have to face" the Applicants, as well as the Employer. Ultimately, Counsel for the Union indicated that the prejudice would be in the form of having to deal with an additional brief, additional oral argument, if that was to be granted, and the time and effort necessary to respond to each.

Decision

[21] I am persuaded that the proper exercise of discretion in this matter is to allow the Applicants joint intervener status at the Judicial Review application. The Applicants meet the four criteria set forth above. This Court places particular weight on the constitutional and public interest aspects of the Judicial Review issues. In granting intervener status to the Applicants, their counsel agreed that the written submissions of the Applicant would be no more than 20 pages and that the Applicants would abide by any timelines set by this Court for the submission of their brief, which could be done within one week of this decision if intervener status was allowed. Further, the Applicants accepted that the Judicial Review judge hearing the application could decide whether the Applicants would be permitted to make oral argument, although in their written materials they asked that they be permitted to make oral argument which they expect would not exceed one-half hour. The Union argued that if intervener status was granted, that they be permitted an extension of time from that already set for the response to the Employer's brief, namely approximately September 22nd, 2014, the Employer's brief being filed August 22nd, 2014.

[22] Remembering that the application itself is scheduled for two full days, the Court finds it reasonable to allow oral argument on the part of the interveners not to exceed one-half hour, unless otherwise directed by the Judicial Review judge. Accordingly, there will be an Order granting intervener status to the Applicants, MAC and Enform on the condition that the Applicants file a brief not exceeding 20 pages on or before the close of business, September 22nd, 2014. The Union will have an opportunity to respond to this brief on or before the close of business, October 3rd, 2014. The Applicants may make oral submissions at the Judicial Review hearing, not to exceed one-half hour unless extended by the Judicial Review judge. Finally, in accordance with the submissions, not objected to by either the Employer or the Union, no costs will be awarded to the Applicants on this application or on the Judicial Review application, nor will any costs be awarded against them on the Judicial Review application.

Heard on the 4th day of September, 2014.
Dated at the City of Calgary, Alberta this 8th day of September, 2014.

Neil Wittmann
C.J.C.Q.B.A.

Appearances:

Peter A. Gall, Q.C.
for the Applicants

John Carpenter and Vanessa Cosco
for the Respondent, Unifor

Barbara Johnston, Q.C. and April Kosten
For the Respondent, Suncor

Court of Queen's Bench of Alberta

Citation: University of Alberta v. Alberta (Information and Privacy Commissioner), 2011 ABQB 389

Date: 20110621
Docket: 1003 05907;1003 08133
Registry: Edmonton

In the Matter of the *Freedom of Information and Protection of Privacy Act*,
R.S.A. 2000, c. F-25, as amended
And In the Matter of Order F2009-023 Issued by the Officer
of the Information and Privacy Commissioner, Dated February 26, 2010

Between: Action No: 1003 05907

The Governors of the University of Alberta

Applicant

- and -

Information and Privacy Commissioner and Dr. Anton Oleynik

Respondents

- and -

Association of Academic Staff of the University of Alberta

Intervenor (proposed)

And Between: Action No: 1003 08133

Association of the Academic Staff of the University of Alberta

Applicant

- and -

Information and Privacy Commissions, The Governors of the University of Alberta and Dr. Anton Oleynik

Respondents

Memorandum of Decision of the Honourable Mr. Justice Donald Lee

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[1] An adjudicator (the Adjudicator) delegated by the Respondent Information and Privacy Commissioner conducted an inquiry into whether the University of Alberta responded appropriately to a request for records by the Respondent, Dr. Oleynik under the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIPPA*). The Adjudicator released her decision (Order F2009-1023) and two applications for judicial review of this decision were brought, Action #1003 05907, an application by the Governors of the University of Alberta (U of A) and Action #1003 08133, an application by the Association of Academic Staff University of Alberta (AASUA).

[2] In February, I ordered that the two judicial review applications be heard concurrently, and that ASSUA's judicial review would proceed first, immediately followed by ASSUA's Intervener's Application in the U of A's judicial review. U of A's application would then follow.

[3] I heard ASSUA's judicial review application and intervenor application on April 13 and reserved my decision on both. These are my reasons on the intervenor application. The issue of whether the Social Sciences and Humanities Research Council Selection Committee (SSHRC) should be notified of the judicial review applications was also raised by Dr. Oleynik and will be addressed herein.

Facts

The Records Request

[4] Dr. Oleynik applied to the University's Information and Privacy Office for the following records for the time period October 15, 2007 to April 18, 2008:

> Email communications between, on the one hand, a member of SSHRC [Social Sciences and Humanities Research Council] Selection Committee No. 15 from U of Alberta, Dr. Richard Szostak (Rick.Szostak.ualberta.ca) and, on the other hand, SSHRC officials and other interlocutors in which my name (Oleynik or Oleinik) is mentioned.

[5] The University wrote Dr. Szostak asking whether he had any records responsive to this request. He replied that SSHRC had directed that all SSHRC electronic correspondence be deleted, and he did so when he returned from SSHRC meetings, and that the SSHRC committee members were further directed by SSHRC to bring all other records to Committee meetings and leave them with the SSHRC for destruction by SSHRC. The University wrote Dr. Oleynik that it had not retrieved any responsive records.

The Inquiry

[6] Dr. Oleynik complained to the Office of the Information and Privacy Commissioner, and eventually an Inquiry was scheduled. The Inquiry identified the issue in question as:

> "a. Did the Public Body meet its duty to the Applicant as provided by s. 10(1) of the Act (duty to assist)?"

[7] The parties to the Inquiry were the University and Dr. Oleynik; no affected parties were named in the Inquiry. The Inquiry was conducted through written submissions, including submissions in response to the Notice of Inquiry and affidavits from University officials and employees, including Dr. Szostak. The Adjudicator also directed the University to answer specific questions, including detailed questions about the University's mandate and about the University's Faculty Agreement. These questions arose within the context of the Adjudicator's review of decisions by the Ontario Information and Privacy Commissioner, and read:

1. Is the mandate of the University of Alberta different from that of Wilfrid Laurier University such that Order PO-2936 can be distinguished?

2. Does the University of Alberta Faculty Agreement preclude or contemplate participation as a member of the SSHRC committee?

3. If the mandate of the University of Alberta is similar to that of Wilfrid Laurier University, and/or the University of Alberta Faculty Agreement

> contemplates participation as a member of the SSHRC committee, would this mean that the University of Alberta has custody or control under the Act of emails on its server created as part of a committee member's role on the SSHR committee.

[8] In its judicial review application, ASSUA argued that the Adjudicator breached the principles of natural justice and the duty to be fair, when she failed to conclude that, as a party to the Faculty Agreement, it was an "affected party" and did not give it notice of the request for review under s. 67 of *FOIPPA*. It argues that it has a different interpretation of the Faculty Agreement than the University and that it should have had an opportunity to present its arguments regarding that interpretation. Its intervenor application in the University's judicial review is based on the same position.

The Adjudicator's Decision

[9] The Adjudicator held that the University had custody or control of responsive records because any emails would have "passed through its servers" or because the University had "some right to deal with the records". As a result, the Adjudicator held that the University had a duty to assist Dr. Oleynik and that it had failed to do so by failing to provide sufficient evidence regarding the searches it performed and why the University was unable to provide the requested records. However, because the University had provided that information in the course of the Inquiry, the Adjudicator did not order the University to provide any further information to Dr. Oleynik.

Relevant Procedural History

[10] The Commissioner and the University applied to strike ASSUA's Originating Notice; Moreau J. struck all but paragraph 2(a) of the Originating Notice, and indicated (Transcript, p.11, ll. 16-22):

> Accordingly I dismiss the application of the Commissioner and the University to strike the amended originating notice filed by the Association. The motion will proceed, as counsel has undertaken to do only on the issue of the impact, if any, of the failure to give notice to the Association of the review. The merits of the adjudicator's decision based on the record filed will be addressed solely in the judicial review application commenced by the University.

Analysis

The Relevant *Rules of Court*

[11] In its intervenor application, AASUA filed a Brief in August 2010, which relied on the old Rules (Alta. Reg. 390/1968). It was seeking either party or intervenor status; it now seeks only intervenor status. By the time the application was heard, the new Rules (Alta. Reg. 124/2010) had come into effect, and both the University and Dr. Oleynik withdrew their opposition to intervention. I, therefore, do not intend to deal with the application under R. 753.10 and R. 38(3) dealing with adding parties, or with the new Rules 3.17 or 3.75 dealing with adding parties.

[12] The lack of opposition to the intervenor application however is not determinative, and the Court still has the discretion to grant or refuse the application.

[13] The old Rules did not expressly provide for intervenor status, and before the new Rules common law principles were applied ***(Ahyasou v. Lund,*** 1998 ABQB 875; see also ***Morrow v. Zhang,*** 2008 ABCA 192; ***Telus Communications Inc. v. Telecommunications Workers Union,*** 2006 ABCA 297). Under the new Rules, Rule 2.10 does so:

> 2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

Common Law Principles

[14] There is nothing in the language of the rule that suggests that the common law principles that have developed in regards to intervenor status are not applicable. Wittmann C.J. recently discussed the law regarding intervenor applications in ***R. v. Hirsekorn,*** 2011 ABQB 156, and set out the following general common law principles:

1. An intervention may be allowed where the proposed intervenor is specially affected by the decision facing the Court or the proposed intervenor has some special expertise or insight to bring to bear on the issues facing the court ***(Papaschase Indian Band v. Canada (Attorney General***), 2005 ABCA 320 at para. 2);

2. An Intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence (***Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs*** (1996), 199 N.R. 1 (F.C.A.) (at para. 2));

3. Intervenor status may also be granted where the proposed Intervenor's interest in the proceedings may not be fully protected or argued by a party (***United Taxi***

Drivers' Fellowship of Southern Alberta v. Calgary (City)), 2002 ABCA 243 (at para. 2)) .

4. The Court should take a two-step approach to determine an Intervenor application: first determine the subject matter of the proceeding, and second determine the proposed Intervenor's interest in the subject matter (***Papaschase*** at para. 5) .

Should ASSUA be Granted Intervenor Status?

[15] ASSUA asserts that determining whether the emails sought were within the custody and control of the U of A, requires an analysis of the true nature of the emails within the context of the relationship between the U of A and the staff association. It further states that the Adjudicator failed to consider Universities' customary practices, the unique characteristics of the University-academic employment relationship, the effect academic freedom has on that relationship and documents created by faculty members, and the unique nature of committee work. It further notes that it can provide background and unique evidence on "the Faculty Agreement, the true nature of the documents and the conditions of their creation, transmission and storage and nature of the relationship between the University and the Academic staff".

[16] Lefsrud J in ***Smyth v. Edmonton (City) Police Service,*** 2005 ABQB 652 discussed the two part test to be applied in an intervenor application, and noted (at paras. 15-16):

> To determine whether a party should be permitted to intervene, the Court must apply a two step process. (***Ahyasou v. Lund***, [1998] A.J. No. 1154 (Q.B.) referred to with approval by the Court of Appeal in the ***Alberta (Minister of Justice) v. Métis Settlements Appeal Tribunal*** [2005] A.J. No. 362, 2005 ABCA 143). The first step is to characterize the subject matter of the proceedings, and the second step is to determine what interest, if any, the proposed intervenor has in it.
>
> The Alberta Court of Appeal in the ***Metis Settlements*** endorsed the following three grounds for determining whether the proposed intervenor has sufficient interest in the subject matter. Those grounds are whether the Applicant:
>
> 1. will be specially affected by the decision facing the Court;
> 2. has some special expertise or insight to bring to bear on the issues facing the Court, or
> 3. has interests that may not be fully protected by the parties.

[17] At the first step, the subject matter of the proceedings is whether the Adjudicator erred in her determination that the University of Alberta had custody and control of the emails in question. Part of her analysis, included interpretation of the Faculty Agreement between ASSUA and the University.

[18] As to the second step, in my opinion, whether AASUA is specially affected by the decision facing the Court, or has any interest that will not be fully protected by the parties to the application, raises many of the same issues as its judicial review of the Adjudicator's decision. However, ASSUA does have some expertise and insight that may be helpful to the Court. ASSUA's submissions on its expertise and insight as to the University-academic employment relationship, the effect academic freedom has on that relationship and documents created by faculty members, and the unique nature of committee work brings a different perspective than that of the U of A as employer, and thus may be of assistance to the Court.

[19] In my view, it is preferable to grant ASSUA intervenor status on that basis, rather than to engage in a premature analysis of whether ASSUA's rights or interests under the Faculty Agreement are affected by the Adjudicator's decision. I therefore grant ASSUA intervenor status on the basis that it can bring an important and different perspective to the Court on the University-academic employment relationship, the effect academic freedom has on that relationship and documents created by faculty members, and the unique nature of committee work.

Should There be Conditions on the Intervenor?

[20] The University of Alberta proposed that if ASSUA's intervention application was granted, it should be subject to the condition that its written and oral submissions be limited to the issue of whether the Faculty Agreement "precludes or contemplates participation as a member of the SSHRC committee?" ASSUA objects to any limitations on its intervention.

[21] This is a judicial review and, subject to very limited exceptions[1], the Court is limited to the record before the tribunal whose decision is under review. Thus, by the very nature of the proceeding, ASSUA is already limited to the record. However, there was some suggestion in oral argument that the entire Faculty Agreement was not before the Adjudicator. ASSUA may file an additional affidavit that includes the entire Faculty Agreement, if it is of the opinion that it is necessary to the Court's determination of whether the Agreement was reasonably or correctly interpreted (I make no finding on standard of review at this point).

[22] As to its submissions, both oral and written, ASSUA must be limited to the issue that they have expressly indicated gives rise to their concerns about the decision – the Adjudicator's interpretation of the Faculty Agreement, and to its expertise and insight as to the University-academic employment relationship, the effect academic freedom has on that relationship and documents created by faculty members, and the unique nature of committee work.

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[1] The exceptions are allegation of bias or breach of natural justice, or where the record of the proceeding before the Board is inadequate because it does not actually reflect the evidence before the tribunal (***Dodd v. Alberta (Registrar of Motor Vehicle Services)***, 2010 ABQB 184 (at paras. 16-18).

Should SSHRC be Involved?

[23] Dr. Oleynik argued that if ASSUA is granted intervenor status, SSHRC should as well. In particular, he appeared to argue that this would be more fair, since without its participation the evidence will be incomplete. He argues that emails between SSHRC and the University of Alberta after his *FOIPPA* application are relevant to the Court's determination. Further, he argues that the "loop-hole" between the Federal and Provincial regime, can be best addressed by having SSHRC included.

[24] ASSUA takes no position on this; the University is concerned that this would unduly complicate and slow down the proceedings.

[25] As noted by counsel for the University of Alberta, this Court has no authority to compel SSHRC to participate; nor would I be inclined to do so if I had the jurisdiction. SSHRC was aware of the *FOIPPA* application; it did not participate. As far as the parties know, it did not follow up to inquire about whether there was a judicial review.

[26] Nor am I inclined to order that it be given notice of the judicial review. This matter has been ongoing for some time, and if any of the parties thought that participation by SSHRC could be relevant, they could have advised it of the judicial review and asked if it cared to participate. No one has done so to date. There is no reason to delay the University's application any longer.

[27] I note again that judicial review is a particular kind of litigation. It is on the record before the tribunal. Evidence of things that occurred **after** the Adjudicator's decision (subject to questions of bias or breach of natural justice **by** the Adjudicator) are not relevant or admissible. Therefore, even if SSHRC was given notice of the application, and chose to seek intervenor status, the evidence Dr. Oleynik thinks is relevant, would not be before the Court.

Conclusion

[28] AASUA's application for intervener status is granted. AASUA will not be permitted to raise any new issues as an intervener, but it may file an affidavit including the entire Faculty Agreement. Its submissions will be limited to the interpretation of the Faculty Agreement and its expertise and insight as to the University-academic employment relationship, the effect academic freedom has on that relationship and documents created by faculty members, and the unique nature of committee work.

[29] No order will be made in relation to SSHRC.

Heard on the 13th day of April, 2011.
Dated at Edmonton, Alberta this 21st day of June, 2011.

Donald Lee
J.C.Q.B.A.

Appearances:

J. Cameron Prowse, Q.C. and Noël Papadopoulos
Prowse Chowne LLP
for the Applicant

Sandra M. Anderson and Anne L.G. Côté
Field LLP
for the Respondent, The Governors of the University of Alberta

Dr. Anton Oleynik
On His Own Behalf

In the Court of Appeal of Alberta

Citation: Lameman v. Canada (A.G.), 2006 ABCA 43

Date: 20060202
Docket: 0403-0299-AC
Registry: Edmonton

Between:

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch, and Elsie Gladue on Their Own Behalf and on Behalf of All Descendants of the Papaschase Indian Band No. 136

Respondents
(Appellants/Plaintiffs)

- and -

Attorney General of Canada

Applicant
(Respondent/Defendant)

- and -

Her Majesty the Queen in Right of Alberta

Respondent
(Respondent/Third Party)

- and -

Federation of Saskatchewan Indian Nations

Respondent
(Intervener)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Keith Ritter

Memorandum of Judgment

Application to Strike Portions of the Intervener's Factum
and Book of Authorities
(Docket: 0103-03088)

Memorandum of Judgment

The Court:

[1] The suit is by persons who say that they are the successors of a former Indian Band improperly deprived of their reserve, and consequently deprived of other rights. The chambers judge granted the defendants summary judgment dismissing the lawsuit, and the plaintiffs appeal.

[2] In September 2005, this Court granted the Federation of Saskatchewan Indian Nations leave to intervene on two specific topics:

> (a) provincial statutes of limitation and their relationship or application to treaty and aboriginal rights in light of treaty interpretation and s. 35(1) of the ***Constitution Act, 1982***; and
>
> (b) whether the appellants have standing to pursue the subject claims, including addressing the status of First Nations not recognized as such whether because of alleged surrender of treaty rights or claimed amalgamations with other First Nations, or otherwise.

That Federation had also sought leave to intervene on the issues of equitable fraud and inappropriateness of summary procedure.

[3] The Federation has now filed its factum and accompanying book of authorities. The two respondent Attorneys-General move to strike out three items from that book of authorities, an affidavit from that factum's appendix, and several large passages from that factum. The appellants and intervener resist that motion to strike.

[4] Two of the three impugned items in the book of authorities are reports by the Indian Claims Commission. The third is a report by a private researcher. These three items are largely factual, not legal. The facts discussed are about both the present dispute, and also several other dissolutions or surrenders of Indian Bands or reserves, said to be similar to the present dispute.

[5] The motion to intervene did not seek to adduce further factual material. Interventions before an appeal court are usually allowed to permit additional legal argument, and sometimes additional policy argument. They are not ordinarily understood as letting the intervener raise fresh issues or adduce additional evidence. If such new matters can ever be permitted (on which we express no opinion), express leave would be necessary. See the Reasons allowing intervention here: 2005 ABCA 320, para. 3.

[6] It is important that both the appellants and the intervener here eschew any intent to ask the appeal court to receive new evidence. That is doubtless partly because some or all of the necessary tests for such new evidence on appeal could not be met here.

[7] One counsel suggested to us that these materials would be admissible evidence. That seems to us irrelevant at this stage. The real objection is that they were never tendered as evidence in the Court of Queen's Bench, let alone open for testing (such as cross-examination) or open to rebuttal.

[8] The arguments by the appellants and intervener are complicated by alternative submissions. Among them is this striking feature. One counsel argues that these three reports are not evidence at all, and should be received for very narrow purposes. The other counsel argues that they are evidence in a sense, and in any event should be received for much broader purposes. We refer not just to argument on the motion to strike, but also to the appellants' and intervener's factums. Counsel are both obviously very sincere, but the net effect of their combined arguments would be inconsistent. Facts would be adduced for a narrow purpose, but then be used for a broad purpose.

[9] If a party could have an appeal court receive any new factual material which the party chose to photostat and coil bind, then the rules about how to adduce and admit evidence in the Court of Queen's Bench, and the rules about admitting new evidence on appeal, would become academic. However, a book of authorities is for legal authorities, not factual material. Terminological disputes about whether such material should be called "evidence" or not, add nothing useful to the debate.

[10] Counsel for the appellants also suggested that these materials should be adduced as non-adjudicative facts. But most or all of them are patently not legislative facts. He also suggested receiving them by way of judicial notice, but their accuracy and relevance and admissibility are here hotly contested. For example, it is alleged that one dispute reported on by the Indian Claims Commission later went on to judgment in the Federal Court. This court cannot possibly take judicial notice of the detailed mechanics of particular reserve surrenders (or purported surrenders) over a century ago.

[11] Finally, it was suggested that this new evidence was receivable as an example of what evidence the appellants would like to adduce at a trial, and so as a ground to reverse the summary dismissal and order a trial. In that special sense, one counsel suggested that the material was not filed for the truth of its contents. We do not find that suggestion to be accurate in any meaningful way here. But one counsel said that the material was filed as what would later be adduced (or was very similar to what would be adduced) at trial to prove the truth of its contents. If the material was filed to show how complex the issues "really are", then the same remarks would apply.

[12] The Court of Queen's Bench of Alberta, this Court, and the Supreme Court of Canada, have all repeatedly held one thing. If a party moving for summary judgment (or dismissal) makes out a ***prima facie*** case, then the party opposing judgment and wishing a trial must adduce some evidence. Mere argument about what might happen at trial, or what evidence he or she might lead at trial, is

insufficient. No counsel offered us contrary authority, nor suggested that he or she knew of any. Of course it may not be possible to get first-hand evidence of all the details in time for the summary judgment motion. That is why most authorities permit hearsay evidence in the Court of Queen's Bench to oppose a motion for summary judgment (or dismissal).

[13] Summary judgment motions are extremely common in chambers, and this law is well-known and relied upon daily. Some provinces have amended their Rules to make summary judgment even easier to get. To permit parties to bar summary judgment with mere factual suggestions unsupported by admissible evidence, would cause daily chaos, and would render summary judgment (or dismissal) almost impossible. To permit a party (in Queen's Bench or on appeal) to adduce unsworn and untested evidence by tabbing it in a book of legal authorities would be tantamount to the same thing.

[14] All of that is forbidden to a party. ***A fortiori*** here. For an intervener to file it and the party opposing summary judgment then to rely upon it, would make even less sense.

[15] Counsel for the appellants objects to this preliminary motion to strike, suggesting that it saves no time, and should have been left to the panel hearing the appeal. However, it seems to us that that approach would produce great uncertainty and possible confusion. The respondents would be left in a quandary as to how to frame their factums and what topics to cover. ***Cf. Astrazeneca Canada v. Apotex***, [2004] 2 F.C.R. 364, 2003 FCA 487 (paras. 13-14). Besides, the order of the previous panel giving leave to appeal must have some effect. If the intervener can disregard the order, then so could the respondents. That is unthinkable.

[16] Therefore, the three reports, being tabs 3, 4, and 5 of the intervener's book of authorities, must be struck.

[17] The intervener has attached as Appendix B to its factum a copy of the affidavit of Jayme Benson which it had filed in the Court of Appeal to support its motion for leave to intervene. Big parts of the affidavit purport to summarize other reserve surrenders and supposed flaws or questionable practices in them. The remarks above apply to this affidavit too.

[18] Though a Court of Appeal can take judicial notice of the fact that it has made orders, or that certain motions were made before it, that does not extend to the facts in affidavits filed before it to support such interlocutory motions. The point comes up from time to time when appellants try to base their appeal on new evidence found only in an affidavit filed to seek a stay pending appeal. See ***Public School Boards Assn. v. A.-G. of Alta.*** [1999] 3 S.C.R. 845 (para. 6); ***Suresh v. R.*** S.C.C. Bull. May 19, 2000 p. 916, [2000] S.C.C.A. No. 106; ***Ahani v. R***., S.C.C. Bull. May 19, 2000, p. 917, [2000] S.C.C.A. No. 120. Such evidence is no part of the record on appeal.

[19] The Benson affidavit must be struck therefore.

[20] It follows that the portions of the intervener's factum which rely upon those materials must also be struck. However, the two Attorneys-General have delineated the offending portions with too broad a brush. A few of the impugned paragraphs seem to us permissible, and we will indicate the distinction below.

[21] That then leaves some other portions of the factum of the intervener (paras. 108-129). The respondents attack those because they are about two topics which the intervention order did not authorize. It seems plain to us that they are unauthorized, especially as one of them was specifically listed by the would-be intervener as a proposed topic. (The other was a topic not even requested for intervention.) As noted, leave to intervene was expressly limited to only two topics, and neither topic authorized encompasses the topics in question here. It is very common for interventions on appeal to be limited (as here) to specified topics, and we wish to say nothing to permit an intervener unilaterally to ignore such restrictions. Those passages must also be removed from the intervener's factum.

[22] However, the practicality of this latter aspect of the motions to strike (not involving new factual material) is questionable. As the intervener and appellants say, equitable fraud (which has a technical meaning) can often be relevant to discoverability and limitations issues.

[23] More to the point, if an intervener thinks of a legal argument which is outside the scope of its permitted intervention, often the easiest thing to do is to reveal the idea and the research to the party whom the idea supports. Nine times out of ten that party will wish to incorporate the idea in his or her factum. That is so here, because the appellants here want these passages kept in the intervener's factum.

[24] Therefore, it seems to us practical that the appellants now have a chance to incorporate those legal ideas in an amended appellants' factum, and that the respondents have a chance to amend their factums in response if they wish to. The appellants may not, however, make reference to, or base arguments upon, any of the contents of the three items being removed from the intervener's book of authorities, nor upon the Benson affidavit. Of course the respondents may (if they wish) still argue (in their factums and orally) that the pleadings, the evidence, the lack of evidence, or the course of argument in Queen's Bench, make it improper or unfair to raise those arguments now. Balancing the interests of the parties and the court, that disposition seems the least harmful avenue to pursue.

[25] Therefore, we allow the motions to strike in part, and order as follows:

1. The Registrar will keep intact on the Court of Appeal file (for archival purposes) one complete copy of the intervener's book of authorities, which copy will not be distributed to the panel hearing the appeal.

2. The Registrar will remove from the other copies of the intervener's book of authorities these three items:

   (a) tab 3: I.C.C. report March 2005

   (b) tab 4: I.C.C. report December 1994

   (c) tab 5: Martin-McGuire study September 1998

   Those copies will be marked as having been amended by this order, and will be distributed to the panel thus amended.

3. No party or intervener may refer to items 2 (a), (b), or (c) on the hearing of the appeal.

4. The factum of the intervener already filed will not be distributed to the panel. The Registrar will keep one archival copy and destroy the rest.

5. The intervener will file with the Registrar (and serve) within 21 days of the date of these reasons an amended factum. Its paragraphs will be consecutively numbered. It will be the same as the one already filed, except that it will omit the Benson affidavit, and will omit the passages now numbered as follows:

   Paras. 4-7

   Para. 24

   Paras. 26-34

   Paras. 37-42

   Paras. 46-62

   Paras. 66-73

   Paras. 108-129

6. Within 21 days of the date of these reasons, the appellants will file (and serve) either a letter electing not to amend their factum, or a new amended factum. The amendment will be confined to adding further legal argument on

the topics of equitable fraud as it affects limitations, and inappropriateness of summary judgment, or either of those topics.

7. The appellants will move forthwith (on notice) before Mr. Justice Costigan (the Edmonton list manager) to fix revised dates for further steps in this appeal, including amended or original respondents' factums.

[26] The respondents had to bring this motion, and substantially succeeded. Part of it was of diminished practical moment, but that part added very little to the length of written or oral argument. Both the appellants and the intervener resisted the motion. The results of the motion are permanent, and the steps taken by the intervener were in no way necessary. Therefore, we award each Attorney-General one set of costs of this motion, payable jointly and severally by the appellants and the intervener. As between the intervener and the appellants, those costs will be shared half and half. Those costs will not include costs for filing amended factums, nor for reviewing or responding to the same. Such costs we leave to the panel hearing the appeal. The costs which we award will be payable only at the end of this appeal, but they may be taxed in the meantime.

Appeal heard on January 26, 2006

Memorandum filed at Edmonton, Alberta
this 2nd day of February, 2006

Côté J.A.

Picard J.A.

Authorized to sign for: Ritter J.A.

Appearances:

R.S. Maurice
for the Respondents (Appellants/Plaintiffs)

M.E. Annich
S.C. Latimer
for the Applicant (Respondent/Defendant)

D.N. Kruk
D. Poskocil
for the Respondent (Respondent/Third Party)

M.J. Ouellette
for the Respondent (Intervener)

Court of Queen's Bench of Alberta

Citation: Auer v Auer, 2018 ABQB 510

Date: 20180629
Docket: 4803 156019
Registry: Edmonton

Between:

Roland Nikolaus Auer

Applicant

- and -

Aysel Igorevna Auer

Respondent

Reasons for Decision
of the
Honourable Mr. Justice M. David Gates

Application by the Attorney General of Canada to Intervene in the Vires Challenge to the Federal Child Support Guidelines filed by Roland Auer

Application by Roland Auer Seeking Recusal of the Case Management Justice

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I. Overview

[1] The Attorney General of Canada, seeks to intervene in an matter commenced by the Applicant (Respondent in these proceedings), Roland Nikolaus Auer ("Dr. Auer"), wherein Dr. Auer asks this Court to find the *Federal Child Support Guidelines*, SOR/97-175 ("the *Guidelines")*, to be *ultra vires* the *Divorce Act*, RSC 1985, c 3 (2nd Supp), and declare them to be of no force and effect.

[2] In addition, as more fully described below, Dr. Auer filed an application on January 17, 2018, in which he asks me to recuse myself as Case Management judge in these proceedings on the basis of reasonable apprehension of bias.

[3] The Attorney General's application seeking intervener status was initially heard on June 9, 2017, and continued on August 11, 2017, and October 10, 2017. For the reasons that follow, the application by the Attorney General of Canada to intervene in these proceedings is granted.

[4] Dr. Auer's applicant seeking my recusal as Case Management judge was heard on February 6, 2018. At the conclusion of oral argument by counsel acting on behalf of Dr. Auer, I reserved my decision. These are my reasons for decision dismissing that application.

II. Background

[5] The parties were married in August 2004 and separated sixteen months later in November 2005. There is one child of the marriage, Nikolaus Auer, born October 2, 2005. He currently resides with his Mother in Edmonton. Dr. Auer now resides in Saskatoon with his current wife and other children, though resided in Montreal for a number of years following separation.

[6] Divorce proceedings before the Court of Queen's Bench of Alberta were launched on December 6, 2005, and a Divorce Judgment was granted on June 20, 2008. Numerous applications related to financial disclosure, child and spousal support, and access, have been filed by the parties commencing in December 2005. The court's procedure record relating to this action number is sixteen pages long. This is high-conflict litigation and the relationship between the parties is strained, indeed highly acrimonious. The matter was placed in case management by order of then Chief Justice N. Wittmann in July 2006, who appointed Justice C. Kenny as the first case management judge. I assumed the role of case management judge on December 6, 2011

[7] Dr. Auer's current challenge to the *Guidelines* has a long and complex history that encompasses two related proceedings. In the first proceeding, launched in November 2012, Dr. Auer and others sought judicial review in the Federal Court challenging the *Guidelines* as being *ultra vires* the *Divorce Act*. The Attorney General of Canada, the named respondent in that proceeding, brought a preliminary motion to dismiss the application on a number of grounds, including that it was brought in the wrong forum.

[8] On May 6, 2013, the Federal Court granted the Attorney General's preliminary motion, finding that the Court of Queen's Bench of Alberta was better placed to hear Dr. Auer's application: ***Strickland v Canada (AG)***, 2013 FC 475. On February 5, 2014, the Federal Court of Appeal upheld the Federal Court's decision to dismiss Dr. Auer's application: ***Strickland v Canada (AG)***, 2014 CAF 33. On July 9, 2015, the Supreme Court of Canada affirmed the decision of the Federal Court of Appeal: ***Strickland v Canada (AG)***, 2015 SCC 37.

[9] In the second proceeding, Dr. Auer seeks the same declaration from this Court as he did from the Federal Court. On June 19, 2014, he commenced this second proceeding challenging the *vires* of the *Guidelines*. This second proceeding arises in the context of on-going, litigation, described above, under the *Divorce Act*. The named respondent in this second proceeding is Aysel Auer, the former wife of the Applicant. Unlike the first proceeding, the Attorney General of Canada is not a named party.

[10] On October 1, 2014, this Court adjourned the second proceeding *sine die* pending the outcome of Dr. Auer's appeal to the Supreme Court relative to the first proceeding. At the same time, Dr. Auer was granted leave to renew his application once the Supreme Court had released its decision, assuming that such an avenue remained open to him: ***Auer v Auer***, 2014 ABQB 650. On August 31, 2016, following the Supreme Court's rejection of his appeal, Dr. Auer renewed and amended his application before this Court (the "Amended Family Application").

[11] Dr. Auer filed other applications with this Court seeking remedies in relation to his ex-wife, Aysel Auer. Those applications seek, amongst other things, to reduce his monthly child support payments, as well as his payments towards extraordinary expenses, in relation to his son, Nickolaus Auer. Dr. Auer also advances an undue hardship claim relative to his child support obligations, arguing that his four other children, from two other marriages, have been prejudiced as a result of the amount of child support he owes on account of Nikolaus. In a further application, Dr. Auer alleges overpayment of both child and spousal support and seeks an order rectifying the order of Jeffrey, J granted December 13, 2010. The parties have agreed to hold in abeyance all of Dr. Auer's other applications to reduce his child support obligations pending the outcome of his challenge to the *Guidelines*.

[12] On September 9, 2016, Aysel Auer advised this Court that she did not intend to participate in Dr. Auer's challenge to the *vires* of the *Guidelines*. On September 12, 2016, the Attorney General of Alberta also advised that she would not seek to intervene in Dr. Auer's challenge. The Attorney General of Canada, however, seeks to intervene, as evidenced by the within application.

[13] The Attorney General of Canada seeks intervenor status pursuant to Rule 2.10 of the *Alberta Rules of Court*, Alta Reg 124/2010. She claims her intervention is especially vital due to the far-reaching consequences that a finding of invalidity will have on family law litigants across Canada.

[14] On February 3, 2017, the Attorney General filed an application to intervene in Dr. Auer's *vires* challenge to the *Guidelines*. A revised application to intervene was filed on August 30, 2017, seeking full party status on the following terms:

a) The Attorney General seeks the right to cross-examine on the following affidavits for no more than one day:

    i) Affidavit of Professor Chris Sarlo, sworn July 8, 2013; and

    ii) Affidavit of Professor Douglas W. Allen, sworn June 7, 2013.

b) The Attorney General seeks the right to make oral and/or written submissions on any aspect of the *vires* application, including evidentiary and jurisdictional issues;

c) The Attorney General requests the right to put public documents before the Court on the *vires* application to establish legislative and social facts concerning the development and implementation of the *Guidelines.* All of the documents to be relied upon by the Attorney General were provided to Dr. Auer following the June 9, 2017, appearance. In the event that any further public documents arise in the course of preparing for the *vires* challenge, the Attorney General may request the ability to reference those documents as well.

d) The Attorney General requests a right to appeal any adverse decision on the *vires* challenge.

[15] Dr. Auer takes the position that this case involves a purely private family law proceeding. As such, he maintains that the Attorney General should be subject to the same requirements as any academic or public interest body seeking to intervene in the proceedings.

[16] In October 2016, Dr. Auer advised that he would consent to the Attorney General's intervention if it was restricted to the right to make submissions orally and in writing on whether the *Guidelines* are *ultra vires* the *Divorce Act*, "unlawful, invalid, illegal, or of no force and effect and should not be applied, and concerning the remedies in the Amended Application." It is common ground between the parties that the Attorney General was not prepared to accept this offer and is seeking a broader scope of intervention.

[17] The hearing of the Attorney General's application commenced on June 9, 2017, and was continued on October 10, 2017. From the outset of this proceeding, counsel for Dr. Auer and for the Attorney General were urged to try and reach an agreement regarding the possible scope of an intervention by the Attorney General. Ultimately, despite the encouragement of the Court, no agreement was reached.

[18] During the course of the proceedings on October 10, 2017, the Court asked the parties to provide submissions on the possible application of s 24(1) of the *Judicature Act*, RSA 2008, c J-2, the provision which affords both the Attorney General of Canada and the Attorney General of Alberta with the ability to intervene as of right in litigation questioning the constitutional validity of an enactment of either the Parliament of Canada or the Legislature of Alberta. Up until this point in time, neither counsel for Dr. Auer nor the Attorney General of Canada had addressed this issue. In the absence of prior notice of the Court's interest in receiving submissions on this issue, neither party were, understandably, able to provide a comprehensive response. The Court then invited counsel to file written submissions on the issue.

[19] In his written submissions, filed November 15, 2017, Dr. Auer's counsel raised for the first time his request for my recusal. Previously, on February 18, 2015, Dr. Auer, personally, wrote to then Chief Justice Wittman stating:

> Justice M. David Gates brings a Conflict of Interest to his position due to his history working for the Department of Justice.
>
> He is presently assigned to judging Case Management MDG 4803 156019 which includes constitutional issues such as the Federal Guidelines Challenge, rending him in clear and transparent conflict. He should be replaced by another justice (emphasis added).

[20] Michelle Somers, Executive Legal Officer, Court of Queen's Bench of Alberta, responded on behalf of Wittmann CJ on March 18, 2015, and advised that any request of this nature should be made directly to the assigned case management judge. No further action was taken by Dr. Auer at that time.

[21] By way of letter dated December 11, 2017, Dr. Auer was directed to file and serve on the other party, Aysel Auer, a formal application seeking my recusal as case management judge. He was also invited to file any affidavit evidence that he wished to rely on in support of his application. He elected to file no further evidence and to rely on his written submissions, as supplemented by oral argument made on February 6, 2018. Counsel for Aysel Auer elected not

to take an active role in the recusal application, save for submitting a letter dated December 14, 2017, a copy of which is appended to these Reasons. She was, however, in attendance during the proceedings conducted on February 6, 2018.

[22] On February 6, 2018, following the conclusions of oral submissions by Dr. Auer, I reserved my decision. These are my reasons for decision.

III. Issues

[23] The following issues arise from the hearing of this matter:

1) Has Dr. Auer established a reasonable apprehension of bias on the part of the Case Management judge so as to warrant recusal from any continuing involvement relative to this matter?
2) Should the Attorney General of Canada be granted intervenor status?
3) If the Attorney General of Canada is granted intervenor status, what is the appropriate scope of that status?

IV. Analysis

Reasonable Apprehension of Bias - Application for Recusal

[24] Dr. Auer raises a number of arguments in support of his application seeking my refusal as case management judge on the basis of a reasonable apprehension of bias:

a) my employment with the Department of Justice (Canada) prior to my appointment to the Court of Queen's Bench on March 3, 2011;
b) the underlying action was commenced in the judicial district of Edmonton, but I maintained case management responsibility for the matter following my transfer to the judicial district of Calgary in September 2014;
c) I have advocated on behalf of the Attorney General, including suggesting that the Attorney General must necessarily intervene in opposition to Dr. Auer's application. In this regard, I have challenged Dr. Auer's counsel without cause;
d) I actively advocated for the Attorney General in raising the possible application of section 24 of the *Judicature Act.*

[25] I propose to deal with the law relating to the issue of bias before turning to address each of these specific allegations.

[26] In ***Steele v Alberta***, 2014 ABQB 124, I considered an application that I recuse myself on the basis of reasonable apprehension of bias based on a past association while employed at Justice Canada with counsel for the Respondent Attorney General of Alberta. At para 29 of that decision, I noted:

> Public confidence in the independence and impartiality of the judiciary is a matter of the utmost importance in our democracy. Not only must judges be independent of other branches of government, they must be individually and collectively free

> of bias, actual or perceived. As such, I approach this allegation of reasonable apprehension of bias with great care, mindful of the significant public interest in safeguarding the integrity of an impartial judiciary.

The Law – Bias/Reasonable Apprehension of Bias

[27] In ***Al-Ghamdi v Alberta***, 2016 ABQB 424, Hillier J provided a very helpful and comprehensive analytic framework for dealing with a recusal request brought in the context of ongoing case management. I place substantial reliance on Hillier J's framework and, most particularly, his thorough review of the applicable case law.

[28] At para 55 in ***Al-Ghamdi***, Hiller J set out the test for bias:

> The test for bias is well known:
>
> ... [would] a reasonable person, properly informed, viewing the matter realistically and practically, and having thought the matter through ... think it more likely than not that the decision maker, whether consciously or unconsciously, would not decide fairly.
>
> ***Point on the Bow Development Ltd v William Kelly and Sons Plumbing Contractors Ltd***, 2005 ABCA 310, at para 5;
>
> See also ***Wewaykum Indian Band Band v. Canada***, 2003 SCC 45 at para. 60; ***Committee for Justice and Liberty v National Energy Board***, [1978] 1 SCR 369 at 394.

[29] In that instance, Al-Ghamdi was a self represented doctor who brought multiple actions against dozens of defendants. Hillier J, with the consent of Al-Ghamdi, was assigned as case management judge for ten of these actions. Al-Ghamdi then wrote a letter to Wittmann CJ, requesting that Hillier J recuse himself due to both actual bias and the reasonable apprehension of bias.

[30] Al-Ghamdi's allegations of bias were founded on three grounds:

i) Hillier J formerly worked at Field Law, a law firm named as a respondent in one of the actions;

ii) Field Law was alleged to have formerly represented several of the other defendants named in Al-Ghamdi's applications while Hillier J worked at the law firm; and

iii) Hillier J still had ongoing relationships with his former partners at Field Law, some of whom were defendants in Al-Gamdi's action against the law firm.

[31] Hillier J dismissed the application for recusal. Al-Gamdi appealed Hillier J.'s refusal to recuse himself to the Court of Appeal. In ***Al-Ghamdi v Alberta***, 2016 ABCA 324, Schutz JA struck the appeal as being out of time. Al-Ghamdi then appealed the striking of his appeal to a different Court of Appeal Justice. In ***Al-Ghamdi v Alberta***, 2016 ABCA 403, Watson JA denied Al-Ghamdi's second appeal. Watson JA also addressed the merits of the original appeal of Hillier J's recusal decision. At paras 18-20, he outlined the test for determining whether a case management judge should recuse himself or herself due to the reasonable apprehension of bias:

> [18] Judges are individuals sworn to uphold justice and the rule of law. A case management judge necessarily has to rule against one party or another or perhaps against all parties in a case from time to time. But even when the judge does so impatiently or adversely to the objecting party the judge is not instantly deemed to lose nexus with their oath: see *Lakhoo v. Lakhoo*, 2016 ABCA 200 (Alta. C.A.) at paras 11-12, (2016), 40 Alta. L.R. (6th) 1 (Alta. C.A.), citing *Harb v. Aziz*, [2016] EWCA Civ 556 (Eng. C.A.) at para 71. As pointed out in *Lahkoo* at para 14:
>
> > . . . Discretionary rulings, even incorrect ones, do not necessarily evidence reasonable apprehension of bias. Indeed, case management would cease to have any benefit if a party who was unsuccessful at one point could therefore spin a wheel for a new judge. That would scarcely make sense let alone work.

Onus and Standard of Proof

[32] In seeking recusal, an applicant bears the onus for proving actual bias or a reasonable apprehension of bias on a balance of probabilities: ***Mugesera v Canada (Minister of Citizenship and Immigration)***, 2005 SCC 39, at para 13. There is a strong natural presumption that a judge is impartial. Hillier J highlights this onus and the high standard in ***Al-Ghamdi*** at paras. 57-59, 80:

> [57] In *McElheran v. Canada*, 2006 ABCA 161 (Alta. C.A.), citing *Wewaykum*, the Court of Appeal noted at para 5:
>
> > The Supreme Court of Canada has also made it clear that the grounds must be serious and inquiries highly fact specific. Moreover, there is a strong presumption in favour of judicial impartiality.
>
> [58] That strong presumption is integral to this analysis. Recently, in *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25 (S.C.C.), the Supreme Court of Canada summarized these principles, noting that the strong presumption is not easily displaced; there must be a "real likelihood or probability of bias"; and the inquiry into bias will be inherently contextual and fact-specific. There is a high burden of proof on the party alleging bias (paras 25-26).
>
> [59] Thus, the onus rests on the party seeking recusal to establish on a balance of probabilities that there is either actual bias or a reasonable apprehension of bias: *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2005 SCC 39 (S.C.C.) at para 13.
>
> [80] …The strong presumption, described by the Supreme Court of Canada, leads to three corollaries: the onus to rebut the presumption lies on the party seeking recusal; there is a high burden of proof; and the grounds for seeking recusal must be both fact specific and contextual. It is not enough to infer an appearance of bias merely because of a lengthy relationship with a law firm that appears before the judge as counsel.

[33] On appeal to the Court of Appeal, Watson JA similarly observed, at para 19-20:

As regards an allegation of bias, *Lahkoo* also notes, at para 11, that:

> [t]he test for reasonable apprehension of bias requires substantial evidence that overcomes the presumption of judicial propriety: see eg *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para 22, [2013] 2 SCR 357. As noted in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 20, [2015] 2 SCR 282, the established test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly . . . ." See also *Harb*.

This test is not applied from the perspective of a "very sensitive or scrupulous conscience": *Lahkoo* at para 12; *Blicharz* at paras 16, 21-22, [*Blicharz v. Blicharz*] [2016] A.J. No. 513 (Alta. C.A.). Even taking the applicant at his word that he did not sue Field Law simply in order to get rid of Hillier J, there was no automatic disqualification of Hillier J following from that fact. It was for Hillier J to decide whether he could continue. Since he had been out of the law firm for a dozen years, I discern nothing unreasonable in his conclusion on that score.

[34] In ***Al-Ghamdi***, Hillier J referred to a number of other decisions that have considered the standard of proof required to establish reasonable apprehension of bias, including ***R v A (JL)***, 2009 ABCA 344, ***Arsenault-Cameron v Prince Edward Island***, [1999] 3 SCR 851, ***R v S(RD)***, [1997] 3 SCR 484, ***Point on the Bow Developments Ltd v William Kelly and Sons Plumbing and Contractors Ltd***, 2005 ABCA 310, and ***LMB v IJB***, 2000 ABQB 939. He reviewed the decisions in ***A (JL)***, ***S(RD)*** and ***Arsenault-Cameron*** at para 56, 60 and 63 of his decision in ***Al-Ghamdi***:

> [56] The Court in ***R v A(JL)***, 2009 ABCA 344, noted that the test is the perception of the reasonable person, not an observer with a suspicious mind or one that is too sensitive (para 18). Further, the Court noted that the hypothetical reasonable person must know all the facts including internal court practices not observable by outsiders (para 21). These facts also include "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold" (***R v S (RD)***, 1997 Can LII 324 (SCC), [1997] 3 SCR 484, citing ***R v Elrick***, [1983] O.J. No. 515 (H.C.), at para. 14).
>
> [60] The nature of impartiality is highly relevant here. The Supreme Court of Canada in ***R v S (RD)***, cited with approval (at para 35) the statement in *Canadian Judicial Council* in *Commentaries on Judicial Conduct* (1991): “True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.”
>
> [63] Similarly in ***Arsenault-Cameron v Prince Edward Island***, Justice Bastarache refused to recuse himself, rejecting the assertion that having written extensively on the topics at issue in the appeal, he would not have an open mind. He

> concluded that the "applicant would have to show wrongful or inappropriate declarations showing a state of mind that sways judgment in order to succeed" (para 5) and that there was no evidence that his beliefs or opinions expressed when he was counsel or law professor would prevent him from coming to a decision based on the evidence (paras 5 and 6).

[35] The Court of Appeal has dealt with the issue of reasonable apprehension of bias on a number of occasions, including ***A(JL)***, noted above, as well as ***McEltheran v Canada***, 2006 ABCA 161. In ***McEltheran***, the Court of Appeal, referring to the decision in ***Wewaykum***, held at para 5 that "[T]he Supreme Court has also made it clear that the grounds must be serious and inquiries highly fact specific. Moreover, there is a strong presumption in favour of judicial impartiality". Similarly, the Court held, at para 17, of ***A(JL)*** that there is "... a strong presumption that judges will be true to their oaths, and will decide an upcoming case on its evidence, applying the law as best they can, without fear or favour". In the latter instance, the Court denied an application to have four of the five members of an appeal panel recuse themselves because the justices in question had previously expressed opinions on the relevant question.

[36] Like Hillier J, I find the decision of Veit J in ***LMB v IJB***, 2000 ABQB 938, to be instructive for a number of reasons. First, Veit J offers a helpful explanation of the concept of impartiality. Relying on the Supreme Court of Canada decision in ***R v S (RD)***, she observed (at para 18) that a judge is impartial if he or she is disinterested in the outcome and is open to persuasion. Second, Veit J also addressed the idea that the mere allegation of bias should give rise to the judge recusing herself or himself. At para 22, she stated:

> It would be natural for members of the public to think that, whenever an allegation of bias is made against a judge, that judge should step aside. The Court of Queen's Bench of Alberta has many judges at its disposal, and it would appear to be easy to replace any one judge with another. When a motion for recusal is made, the question then might arise: Why does a judge even have to think about it, why not just disqualify herself?

[37] Veit J went on to further state (at paras 23-25):

> The concern of every judge against whom an allegation of bias is made is reflected in the words of McEachern, C.J.B.C. in ***G.W.L. Properties***, [1992] BCJ No 2828]:
>
> > A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to insure that there is no appearance of unfairness. That, however, does not permit the court to yield to every angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to ensure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or price.
> >
> > …

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide in their favour.

[38] Finally, Veit J addressed the particular circumstances of a case management judge and the question of whether the same test for reasonable apprehension of bias should apply. Relying on ***Control & Metering Ltd v Karpowicz*** (1994), 17 OR (3d) 431 (Ont Gen Div), and ***Sandboe v Coseka Resources Ltd***, 1989 ABCA 22, she concluded (at para 27):

> As a case management judge, I have considerable discretion to make those decisions; it is entirely appropriate that my status should be dealt with on the same basis as if I were a trial judge.

[39] Hillier J expressed agreement with the decision of Veit J in ***LMB*** regarding the test for reasonable apprehension of bias for judges performing a formal case management function.

[40] As an aside, I share Hillier J's comment in ***Al-Ghamdi*** (at para 69) that the Court no longer has "many judges at its disposal", as suggested by Justice Veit. The current shortage of judges has reached a crisis in terms of the Court's ability to deliver on its core mandate to the people of Alberta.

[41] In *Ethical Principles for Judges* ("Ethical Principles"), a document published by the Canadian Judicial Council, a series of principles are set out to provide ethical guidance for federally appointed judges. While advisory in nature, Chief Justice McLachlin, as she then was, states in the forward to the document: "The adoption of a widely accepted ethical frame of reference helps the Council fulfill its responsibilities and ensures that judges and the public alike are aware of the principles by which judges should be guided in their personal and professional lives". The document is stated to be the most comprehensive treatment of the subject to date in Canada.

[42] Ethical Principles notes (at para 32) that "litigants who perceive bias where no reasonable or fair minded and informed person would find it, are not entitled to different or special treatment for that reason".

[43] Paperny JA cautioned in ***McEltheran*** (at para 6) that recusing oneself without an adequate evidentiary basis to establish a serious concern could diminish the public respect for the administration of justice. This concern is echoed in Ethical Principles that a judge should not unnecessarily withdraw, because it adds to the burden on colleagues and contributes to delay in proceedings. (p 51, E.19).

Role of the Justice Hearing the Application for Recusal

[44] A judge hearing a recusal application remains a neutral fact finder and adjudicator notwithstanding the unique nature of the application. In other words, the judge does not take on an adversarial role simply because his or her impartiality is being attacked. Likewise, a judge is not allowed to provide evidence to refute the allegation. The judge must consider whether the applicant has met the onus based on the submissions of counsel and the evidence they may adduce. Any information the judge may wish to add can be provided in his or her reasons for decision.

[45] In ***Al-Ghamdi***, for example, Hillier J noted, at paras 31-32:

> As Dr. Al-Ghamdi, as a member of a law society in Canada, must know a judge cannot in any circumstances, before, during or anytime after a hearing or matter, provide evidence; it is antithetical to our role. His statements, raised as they are in mere submissions, cannot be cross-examined on by the Respondents; and because of my adjudicative role, there is no way to address the many inaccuracies.
>
> The Court must give no weight or relevance to these statements. To respond to such allegations in any other way would undermine our judicial process as I will later review from the case law having regard to public respect for the administration of justice.

[46] A judge in a recusal hearing also does not have any obligation to "disclose" additional information to an applicant seeking recusal. The onus remains on the applicant throughout to provide sufficient grounds to meet the burden of establishing bias. Hillier J addressed this point in ***Al-Ghamdi***, at paras 77-78:

> Dr. Al-Ghamdi expressed concern about what he described as "lack of disclosure", as set out in the CJC Handbook and argued that he was placed in a difficult position because he has no way of ascertaining my relationship with Field LLP. He apparently conducted some (inaccurate) biographical research, but that is not the kind of evidence that rises to the level required for recusal — serious and highly fact specific (*Wewaykum*, at para 76 and 77; *McElheran* at para 5). The test is not simply that I had a relationship with the law firm, since that is covered off by the cooling off period as set out in the CJC Handbook.
>
> In my view, Dr. Al-Ghamdi has misunderstood what the Handbook meant by disclosure. Any obligation I had to disclose was met in the first hearing when he was advised that I had been a partner at Field LLP with Mr. Windwick. It is not, and cannot be, my obligation to provide evidence to Dr. Al-Ghamdi. That would be in direct contravention of my role as adjudicator and neutral fact finder. Dr. Al-Ghamdi, as a non-practicing lawyer, may have confused the concept of Crown disclosure in a criminal matter with the much more limited meaning in this context. A judge cannot be obligated to, in effect, testify and provide evidence to address the presumption (whether to demonstrate impartiality or evidence to rebut it) without seriously undermining the judicial process.

[47] The evidentiary challenges presented by a recusal application are exacerbated in the present situation by virtue of the manner in which this application arose. As previously noted, Dr. Auer raised this request for the first time in his written submissions filed on November 15, 2017, in relation to the Court's request for submissions on the possible application of s 24 of the *Judicature Act*. All that is before me are the various transcripts appended to Dr. Auer's written submissions, together with his oral submissions, a letter submitted by Aysel Auer's counsel, and the Court record. As previously indicated, counsel for Aysel Auer elected not to take an active role in this recusal application. In the result, there is no party to adduce any additional evidence or to clarify or counter any of the arguments advanced by Dr. Auer.

[48] I now turn to address Dr. Auer's specific allegations.

[49] At para 77 of his brief, Dr. Auer takes the position that a judge should refrain from sitting on cases involving former clients "until a reasonable period of time has passed". He states that prior to my appointment to the Court of Queen's Bench in 2011, I was "Senior Regional Director and then Senior General Counsel at the Edmonton Office of Justice Canada, the same organization that represents the AGC [Attorney General of Canada] in the within proceedings…" Dr. Auer contends that while this prior connection to Justice Canada does not raise a reasonable apprehension of bias, "it is a factor to be considered in determining whether such a bias may appear to exist".

[50] In this instance, the following timelines require consideration:

a) March 3, 2011, I was appointed to the Court of Queen's Bench of Alberta. Prior to my appointment, as set out in Dr. Auer's written submissions, I was employed as Senior Regional Director and Senior General Counsel at Justice Canada;

b) December 6, 2011, I was appointed the case management judge in this matter, Kenny J having previously served as the case management judge commencing in July 2006;

c) October 2, 2014, I heard and granted an application brought by counsel on behalf of the Attorney General of Canada to adjourn *sine die*, Dr. Auer's Queen's Bench application filed on June 19, 2014, challenging the *vires* of the *Guidelines*, pending the outcome of Dr. Auer's parallel challenge to the *Guidelines*, then under reserve before the Supreme Court of Canada.

d) February 3, 2017, the Attorney General of Canada filed an application to intervene in Dr. Auer's *vires* challenge to the *Guidelines*. A revised application was subsequently filed on August 30, 2017. The Attorney General of Canada's application was actually heard on June 9, 2017, and continued on August 11, 2017, and October 10, 2017.

[51] Under the general heading "Conflict of Interest", Ethical Principles offers the following commentary at E.19 relative to former clients:

> Judges will face the issue of whether they should hear cases involving former clients, members of the judge's former law firm or lawyers from the government department or legal aid office in which the judge practised before appointment. There are three main factors to be considered. First, the judge should not deal with cases concerning which the judge actually has a conflict of interest, for example, as a result of having had confidential information concerning the matter prior to appointment. Second, circumstances must be avoided in which a reasonable, fair minded and informed person would have a reasoned suspicion that the judge is not impartial. Third, the judge should not withdraw unnecessarily as to do so adds to the burden of his or her colleagues and contributes to delay in the courts.
>
> The following are some general guidelines which may be helpful:
>
> a) A judge who was in private practice should not sit on any case in which the judge or the judge's former firm was directly involved as either counsel of record or in any other capacity before the judge's appointment.
>
> b) Where the judge practised for government or legal aid, guideline (a) cannot be strictly applied. One sensible approach is not to sit on cases commenced in the particular local office prior to the judge's appointment.

c) With respect to the judge's former law partners, or associates and former clients, the traditional approach is to use a "cooling off period" often established by local tradition at 2, 3 or 5 years and in any event at least as long as there is any indebtedness between the firm and the judge and subject to guideline (a) above concerning former clients.

d) With respect to friends or relatives who are lawyers, the general rule relating to conflicts of interest applies, i.e., that the judge should not sit where a reasonable, fair minded and informed person would have a reasoned suspicion that the judge would not be impartial.

[52] In ***Steele***, the applicant maintained that the required cooling off period had not been honoured given that counsel for Alberta and I were both employed by the Federal Department of Justice until January 2011, when counsel commenced her employment with the Respondent Attorney General of Alberta. In that instance, there was no suggestion of an actual conflict of interest. Similarly, the Applicant did not suggest that Alberta's counsel and I were either friends or relatives. Rather, the entire basis for the recusal application was based on an alleged breach of what Steele contended was an invariable 2, 3 or 5 year "cooling off period" governing situations of this nature.

[53] In dismissing the application for recusal, I discussed the guidelines set out in Ethical Principles. At paras 31-33, I observed that this publication:

> …contains guidelines and not rules that are to be strictly enforced. Of course, that does not diminish the significance of these guidelines in providing guidance and advice to members of the judiciary…
>
> I would point out that Guideline (b), above, makes specific reference to the unique circumstances facing judges who practised for government prior to their appointment to the bench. This guideline expresses the need for a more flexible approach to the application of Guideline (a). In my view, this recommended flexibility recognizes the significant difference between the legal and financial relationship that exists between law partners and associates jointly engaged in the business of operating a law firm, and employees working for a government legal organization or department. In particular, there is no financial or business relationship between members of the same government legal department. Further, the notion of a "client" is not traditionally associated with a public sector legal department or organization.
>
> With respect to Guideline (c), the text is clearly focused on the private practice of law. It refers to "former law partners", "associates" and "former clients". More significantly, it explicitly links a 2, 3 or 5 year cooling off period to the existence of possible indebtedness between the firm and the judge. In my view, properly construed, this particular guideline is focused on both the possibility of a reasonable apprehension of bias and a real conflict of interest stemming from the former business and financial connection between the judge and his or her former partners and associates. As previously noted, this business and financial

> foundation is integral to the private practice of law, but it is not found in a public sector legal department or organization.

[54] Past association with a matter as a public servant does not automatically necessitate recusal. For example, in ***Wewaykum***, the Supreme Court held that a reasonable person would not have an apprehension of bias on the basis that Binnie J had actual, though very limited, involvement on the same file while serving as Associate Deputy Minister of Justice (Canada). The Supreme Court focused on the passage of time, a period of fifteen years, together with the limited nature of the prior involvement.

[55] In ***Canada (AG) v Khawaja***, 2007 FC 533, Mosley J refused to recuse himself from a matter involving a challenge to legislation that he had previously worked on while an employee at the Department of Justice (Canada). Further, in ***Tymkin v Winnipeg Police Service***, 2007 MBQB 98, Schulman J refused to recuse himself from a matter related to a ten year-old Commission of Inquiry Report in relation to which he had served as Commissioner. However, in ***Dahlseide v Dahlseide***, 2011 ABQB 696, Stevens J did recuse himself as case management judge in a family law matter due to the fact that one of the parties sent correspondence to him while he served as Minister of Justice. Further, the Director of the Maintenance Enforcement Program, a program administered by Alberta Justice, conducted an investigation related to the parties. Finally, one of the parties launched a private prosecution against the other party and the charge was subsequently stayed by counsel employed by Alberta Justice. In such circumstances, Stevens J concluded that his direct involvement in the file led to a reasonable apprehension of bias.

[56] In terms of the Guidelines, I would note that, unlike the circumstances in ***Wewaykum*** or ***Dahlseide***, I had no prior involvement with this matter while employed at Justice Canada prior to my appointment to the Court of Queen's Bench. Dr. Ayer filed his application in this Court challenging the *vires* of the *Guidelines* almost six years following my appointment. The involvement of the Attorney General of Canada arose thereafter, possibly as early as October 2014, when I first heard an application filed by the Attorney General to adjourn Dr. Auer's Queen's Bench application *sine die* pending the outcome of a similar challenge in the Supreme Court of Canada. This was a full three and one half years after my appointment to the Court.

[57] No issue was raised at the time of the October 2014 hearing regarding my prior association with Justice Canada. Likewise, no issue was raised during any of the various hearings of the within matter. As previously indicated, the first notice of Dr. Auer's intention to seek my recusal on account of bias was conveyed in his written submissions filed on November 15, 2017, relative to the possibly applicability of s 24 of the *Judicature Act*. As previously noted, Dr. Auer wrote to former Chief Justice Wittmann in February 2015, alleging conflict, but took no further steps even after being advised of the process that he was required to follow.

[58] In raising this concern, Dr. Auer concedes that this prior association does not raise a reasonable apprehension of bias. As such, he takes no position as to what might constitute a reasonable cooling off period in this instance. While he goes on to suggest that "it is a factor to be considered in determining whether such a bias appears to exist", he offers no insight or position as to how this prior association should actually be factored into this assessment of whether a reasonable apprehension of bias has been established.

[59] In ***Steele***, at para 36, I made reference to the fact that all members of the judiciary come from the legal profession and, as such, necessarily have connections or linkages to various legal groups or organization:

> In circumstances such as these, it is important to look at the situation more generally through the eyes of a reasonable, fair minded and informed person. Would such a person have a "reasoned suspicion" that I could not be impartial? In my view a reasonable, fair minded and informed person would appreciate that lawyers, like other workers, are highly mobile and move from law firm to law firm, organization to organization, and law firm to organization over the span of a legal career. Judges on the Court of Queen's Bench of Alberta, like all other superior courts in Canada, necessarily come to the bench from that same legal profession.

[60] As previously indicated, there is no suggestion that I had any involvement in this matter prior to my appointment to the Court. Likewise, there is no suggestion that I have a current or on-going personal or professional relationship with counsel acting on behalf of the Attorney General of Canada. Rather, the concern appears to relate only to the fact that I was employed at Justice Canada prior to my appointment.

[61] In my view, a reasonable person, properly informed, viewing the matter realistically and practically, and having thought the matter through, would not conclude that my prior professional association with Justice Canada would give rise to a concern that I would not decide this matter fairly. After the passage of more than six years, I am satisfied that the "distance" that existed between Justice Canada and myself would be viewed as too remote to give rise to a reasonable suspicion that I could not be impartial in a matter involving the Attorney General of Canada.

The underlying action was commenced in the judicial district of Edmonton, but I maintained case management responsibility for the matter following my transfer to the judicial district of Calgary in September 2014

[62] At para 78 of his written submissions, Dr. Auer contends that, notwithstanding that the proceedings were commenced in Edmonton in 2005, I have "effectively seized myself with the matter despite sitting in the incorrect judicial district" [Applicant's Brief, paragraph 78].

[63] The background to this matter, as previously described, reveals that this matter was placed in case management in July 2006, when then Chief Justice Wittmann appointed Kenny J, a Calgary based judge, as the first case management judge. I was appointed as the case management judge in December 2011, while resident in Edmonton. I was subsequently transferred to Calgary in September 2014, and retained conduct of the file. At the time of my appointment as the Case Management judge, Dr. Auer was resident in Montreal, though represented by Edmonton counsel.

[64] The authority of the Chief Justice to direct a matter to case management is set forth in Rule 4.13 of the *Alberta Rules of Court*, as follows:

> 4.13 The Chief Justice may order that an action be subject to case management and appoint a judge as the case management judge for the action for one or more of the following reasons:
>
> a) to encourage the parties to participate in a dispute dispute resolution process;

b) to promote and ensure the fair and efficient conduct and resolution of the action;
c) to keep the parties on schedule;
d) to facilitate preparation for trial and the scheduling of a trial date.

[65] Case Management in civil and family cases is the subject of a *Notice to the Profession and Public* (NP#2016-03 – June 27, 2016), which reads in part as follows:

> Unlike a conference under Rule 4.10, which is intended to provide short-term assistance with litigation management, CM involves the appointment of a CMJ under Rule 4.13 and takes place over a longer period of time, typically continuing until the issues in dispute between the parties have been resolved through settlement or at trial. CM may involve identifying issues, discussing resolution, making interim and procedural rulings, and creating and facilitating a litigation plan to move the matter to settlement or trial.
>
> **Neither a conference under Rule 4.10 nor the appointment of a CMJ under Rule 4.13 relieves parties of responsibility for managing their dispute and planning its resolution in a timely and cost-effective way as required by Rule 4.1** (Emphasis in original)

[66] The *Rules of Court* make it plain, that parties involved in litigation have a significant role to play in seeking to resolve their disputes and to be ever-mindful of the fact that publicly funded Court resources should be used as effectively as possible. To this end, Rule 1.2 provides:

> 1.2 (1) The purpose of these Rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) In particular, these rules are intended to be used
>
> a) to identify the real issues in dispute,
> b) to facilitate the quickest means of resolving the claim at the least expense,
> c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
> d) to oblige the parties to communicate honestly, openly and in a timely way, and
> e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

[67] Case management is an assignment that requires the parties to bring all interim applications before the same judge unless that judge rules otherwise. Fundamentally, case management is based both on judicial economy and in ensuring that litigants are not required to continually "re-educate" the presiding judge, possibly a different judge on each application, regarding the history or background to the matter. Case management, as previously indicated, is a judicial assignment and should not to be confused with a situation where a judge makes a determination to seize himself or herself with a particular matter.

[68] It is important, in my view, to note the limited role of a case management judge. By virtue of Rule 4.15, a case management judge is precluded from hearing the trial or summary trial of the matter. The parties have already been advised that I do not intend to hear the actual challenge to the *Guidelines* or any of Dr. Auer's other extant applications on hold pending the outcome of the *vires* challenge to the *Guidelines*.

[69] By the time of my relocation to Calgary in September 2014, I had already devoted two and one half years to the case management of this matter. This was one of a small group of high conflict case management assignments that I elected to retain notwithstanding my transfer to the judicial district of Calgary. My continued responsibility for this matter was approved by Associate Chief Justice J. Rooke. My decision to retain case management responsibility for this matter was based on the importance of maintaining continuity and to avoid burdening one of my Edmonton judicial colleagues with an additional case management file. In my view, this was consistent with the third factor referred to in Ethical Principles, namely that a judge should not withdraw unnecessarily as to do so adds to the burden of his or her colleagues and contributes to delay in the courts.

[70] I would note that Dr. Auer's current counsel resides in Calgary. Both Mr. Solomon and Mr. Chartrand, counsel for Dr. Auer in relation to his other family law applications currently on hold pending the outcome of his *vires* challenge to the *Guidelines*, live and work in Calgary. Dr. Auer currently resides in Saskatoon, though previously resided in Montreal. Aysel Auer and her counsel both reside in Edmonton.

[71] In her December 14, 2017, letter to the Dr. Auer's counsel, Aysel Auer's counsel, Denise Kiss, states as follows:

> We do find it a bit odd that one of your arguments relates to the fact that the proceedings have continued to be heard in Calgary despite neither party residing in that jurisdiction. We recall this specific issue being raised during one of the earlier Case Management meetings and we certainly understood your position at that time to be that, as both Dr. Roland Auer's counsel (yourself) and Mr. Justice Gates were in Calgary, and as Dr. Aysel Auer was not taking a position on either the Intervenor application for Dr. Roland Auer's Federal Child Support Guideline challenge, it was appropriate for those matters to be heard in Calgary. It was contemplated that the other applications, that have been held in abeyance, would ultimately be heard in Edmonton.

[72] I would note one other portion of Ms. Kiss's December 14, 2017, letter in which she confirms: "Mr. Justice Gates has made it clear that his involvement in this matter would end after the hearing of the Intervenor application. We have been advised of this now on several occasions". While this letter is not evidence in that it is not contained in an affidavit, I take it into consideration as part of the court record. I would simply add that Dr. Auer has not challenged the contents of this letter and, indeed, provided a copy of the letter to the Court.

[73] In my view, it is important to consider that case management in family law matters is frequently utililized in difficult, high-conflict cases. This is such a case. The relationship between the parties is severely strained, indeed toxic. From the outset, they have experienced significant difficulty in communicating with one another regarding any issue pertaining to their son. Every access arrangement involved protracted negotiations and required explicit and detailed court orders in each and every instance to try and avoid any possible ambiguity or misinterpretation.

[74] In retaining responsibility for this case, the Court wanted to avoid passing on a very difficult assignment to someone else, unfamiliar with the circumstances of the case. Under the circumstances, I am not persuaded that a reasonable person, properly informed, viewing the matter realistically and practically, and having thought the matter through, would conclude from my decision to retain responsibility for this matter that I would not decide this issue fairly.

I have advocated on behalf of the Attorney General, including suggesting that the Attorney General must necessarily intervene in opposition to Dr. Auer's application. In this regard, I have challenged Dr. Auer's counsel without cause

[75] Dr. Auer relies on the decision of Kent J in ***SLL v LC***, 2010 ABQB 92, as support for the proposition that the active participation of a judge during the course of a trial can give rise to a reasonable apprehension of bias. Dr. Auer contends that this is what occurred in the within matter, namely that I became an active participant in the proceedings and that I reached the conclusion his application was constitutional in nature, thereby necessitating the involvement of the Attorney General of Canada in the matter, before having heard argument on the point.

[76] In ***SLL***, Kent J was sitting on appeal from a decision of Prowse-O'Ferrall PCJ who, following a contested guardianship and access trial involving the biological mother and biological paternal grandparents of a then seven year old child, ordered that the biological mother should have guardianship of the child with access time to the paternal grandparents. Following the trial, the paternal grandparents, with whom the child had previously resided, appealed the order of the Provincial Court on the basis of alleged bias on the part of the trial judge during the course of the trial.

[77] In concluding that a reasonable person informed of all the facts would apprehend bias, Kent J cited several factors as supporting her decision. First, she referred to three separate exchanged between the trial judge and counsel during the course of the trial, but before hearing any evidence from the appellants. At para. 30, she stated:

> … most particularly on the second day of trial when the judge expressed the view that she was considering calling child welfare authorities or giving interim care to the mother. That was not probing to find out information, that was stating a conclusion. The judge appears to have concluded that the appellant had a serious drug problem and that the child should not be in her care.

[78] Second, Kent J found that the trial judge's credibility findings were tainted by bias, specifically her reliance on demeanour evidence and her failure to consider important evidence favourable to the appellants in her written reasons.

[79] In my view, the decision in ***SLL*** is readily distinguishable from the within matter. First of all, ***SLL*** involved a trial in which the trial judge was called upon to make a decision relative to a dispute between two potential guardians, the child's mother and his paternal grandparents. As such, the trial judge was required to make findings of fact based on, amongst other things, her assessment of the credibility of the witnesses giving evidence before her.

[80] The role of a case management judge is very different from that of a trial judge. In ***Al-Ghamdi***, Hillier J addressed this difference in the following terms (at para 93):

> The test for a reasonable apprehension of bias is factual and contextual. As the Respondents noted, a case management justice has a limited role and will not decide the ultimate issues either at trial or in summary disposition. This context is

> important in assessing whether a reasonable person would have an apprehension of bias. The case management justice is a facilitator for the parties, helping them to narrow the issues, as I did in the February 9, 2016 and April 29, 2016 letters. I conclude that a reasonable person with knowledge of this limited role would not have a reasonable apprehension of bias.

[81] As the case management judge in this instance, my role was much narrower than that of the trial judge in ***SLL***. As described by Hillier J in ***Al-Ghamdi***, my role was that of a facilitator to assist in getting this matter ready for a hearing on the merits relative to Dr. Auer's substantive challenge to the *Guidelines*. As facilitator, my role was to probe, to use the language of Kent J, but also to encourage, cajole and, if required, direct the process towards a hearing on the merits. While I accept without reservation Kent J's articulation of the law relative to the issue of bias and reasonable apprehension of bias, I am of the view that her application of those principles in ***SLL*** is unhelpful in this instance.

[82] In her decision in SLL, Kent J refers to the Manitoba Court of Appeal's decision in ***Metis Child Family and Community Services v M(AJ)***, 2008 MBCA 30. She cites two passages from that decision which are, in my view, instructive in this instance. At para 58 of the Manitoba decision, the Court of Appeal states:

> Thus, an apprehension of bias will not result merely from the active participation of a judge in the trial. There must be something more. There is a point at which judicial intervention becomes interference, the image of impartiality is destroyed and the court is deprived of its jurisdiction.

Subsequently, at para 76, the Court states:

> Next, while a judge must maintain an open min, this does not me that he or she cannot express disbelief of evidence being given by a witness or indicate a tentative view of how he or she is inclined to decide an issue in dispute. True impartiality does not require that the judge have no sympathies or opinions.

[83] In his application, Dr. Auer intends to raise important and difficult issues regarding the validity of the *Guidelines*. The Courts concern throughout was to have the benefit of fulsome and complete argument on a matter of significance, potentially having far-reaching impact beyond this particular case. An identical application had gone all the way to the Supreme Court of Canada. Aysel Auer had, as of September 2016, already indicated that she was not going to participate in this aspect of the proceedings, leaving the Court in the unenviable position of having to decide this important issue without the benefit of full argument. It was in the context of this potential conundrum that the Court urged the parties to try and reach an agreement on the scope of intervention so as to obviate the requirement for the Court to search out other options to ensure that the judge hearing this matter would have the proper evidentiary foundation and legal framework to rule on the issue. The Court was looking for assistance in making sure the issues were fully argued before the Court. The court was potentially in the very difficult position of having to adjudicate solely on Dr. Auer's representations as to the validity of the *Guidelines*.

[84] Dr. Auer contends that "[T]he Court's role in encouraging, and setting the stage for, evidence and opponents against Roland Auer in itself gives rise to a reasonable apprehension of bias" [Applicant's Brief, para 85]. Preparing or facilitating this matter for hearing required that a complete factual record be in place upon which to resolve the legal issue relating to the *vires* of

the *Guidelines*. This requirement lay at the heart of the Court's efforts to secure the participation of Aysel Auer on this aspect of the matter. Dr. Auer speaks of the Court's "insistence" and its "directive" to counsel for Aysel Auer to provide background evidence to the Court to serve as the foundation for the *vires* challenge to the *Guidelines.* With respect, this does not accurately reflect how this issue unfolded. The Court neither directed nor insisted that Aysel Auer file an affidavit in this matter. Rather, the Court asked Dr. Auer's counsel to confirm Aysel Auer's intentions relative to the *vires* challenge to the *Guidelines*, generally, and to express concern that, absent Ms. Auer's participation, the judge hearing the application would only have one version of the facts.

[85] Aysel Auer's counsel, Denise Kiss, was in attendance at the June 9, 2017 court appearance. She explained the circumstances in the following terms:

> Well Sir, my understanding, and obviously I wasn't at the last appearance is, was that after the last appearance, Mr. Solomon contacted me and asked to have – – or indicated that the Court had wanted him to have a discussion as to - – to confirm I guess, Ms. Auer's involvement in the - – in the Federal Child Support Guidelines challenge. That discussion took place and you know, again, I am – – I am – – my interpretation of what took place last time without my having been there, was that the Court had some concerns that Ms. Auer was not involved because there was only one – – one side of the story being presented to the court, in terms of the facts. If that's not the case then maybe I am misinterpreting what's gone on.
>
> So based on that, I had further discussions with Ms. Auer and although she's not – – she still not interested in taking a position on the challenge itself, she is prepared to provide affidavit – – an affidavit in response to the affidavits that have been filed previously by Mr. Auer dealing with the facts, the background, I guess. And that's why I am involved, because I don't - – I need – – or I'm going to be asking the Court then for clarification in terms of just the length of the affidavit, you know, dates for filing, all of the sorts of procedural things, that's why I was here today, Sir.

[86] Before leaving the matter of Aysel Auer's provision of an affidavit, I would note that in the very next paragraph of his brief, paragraph 86, Dr. Auer seems to acknowledge that the addition of Ms. Auer's affidavit did indeed satisfy the requirement for a full evidentiary record. Paragraph 85 reads as follows:

> It is submitted that the Court now has a full evidentiary record before it, with which it can properly here, consider, and decide Roland Auer's Applications. The full factual record that Justice Gates required is now before the Court submitted by a proper party to the Action and there is no need for the AGC to fill the role as Roland Auer's opponent in these proceedings.

[87] With respect, Dr. Auer conflates bias with the Court's legitimate request that he and the potential intervener assist the Court in the resolution of this dilemma. The Court was not advocating for the Attorney General of Canada. Rather, the Court was articulating its need to be fully apprised of the factual underpinnings to the application, and to hear full argument so as to enable it to render a fair and just decision.

[88] Based on the long history between Dr. Auer and the Attorney General of Canada, the Respondent in the *vires* challenge to the *Guidelines* launched in Federal Court in 2012, together with the reported negotiations in October 2016 relative to the within matter, it initially appeared that Dr. Auer conceded that the Attorney General of Canada would play some role in the Queen's Bench *vires* challenge to the *Guidelines*. The issue between Dr. Auer and the Attorney General at that juncture was focused on the precise scope of the Attorney General's role in the proceedings as intervener, not whether the Attorney General of Canada should continue to have a role in Dr. Auer's on-going challenges to the *Guidelines*. The Attorney General of Canada's continued interest in the matter could hardly have come as a surprise to Dr. Auer given the nature of his challenges and the prior, very prominent role played by the Attorney General in the identical challenge in Federal Court, the Federal Court of Appeal and the Supreme Court.

[89] Based on the record, Dr. Auer and counsel for the Attorney General of Canada were ultimately unable to come to an agreement as to the scope of the intervention. At that point, it seems clear that Dr. Auer withdrew his offer to resolve the matter on his proposed terms. I would simply add that it is equally clear from Dr. Auer's oral and written submissions that he is frustrated by what he perceived to be the tactics of the Attorney General relative to his *vires* challenge to the *Guidelines*, in what he insists is a purely private law matter. On the evidence before me, it was apparent that Dr. Auer viewed the Attorney General as an adversary. At para 80 of his written brief, Dr. Auer states: "Aysel's informed decision not to take a position on the ABQB *Guidelines* Application does not give the AGC standing as of right to intervene nor does it give the AGC the opportunity to act as Roland Auer's opponent or enemy in these proceedings". At para 32 of his written brief, Dr. Auer states: "Roland Auer and Aysel Auer are faced with a third-party who has been able to successfully derail a private matrimonial action for over three years".

[90] What this rhetoric suggests is that Dr. Auer does view the Attorney General of Canada as an "opponent", indeed an "enemy" in these proceedings. Somewhat paradoxically, he appears to concede at para 80 of his written submissions that an intervener is not an opponent. I agree. The role of an intervener is to assist the court in the resolution of a matter by providing a perspective that would not otherwise be available to the court in the resolution of the matter.

[91] In retrospect, it may well have been unrealistic, even naive, under the circumstances for the Court to have continued to believe that Dr. Auer and the Attorney General of Canada could find a way to reach an agreement on the scope of the Attorney General's requested intervention. However, it was, in my view, reasonable to have pressed counsel to continue their efforts to try to resolve the issue themselves. Such an approach is consistent with Rule 1.2 of the *Rules of Court*, which clearly places an onus on litigants to manage their own litigation. While the further discussions obviously did not entirely resolve the matter, it is significant, in my view, that the discussions led counsel for the Attorney General of Canada to revise and limit the scope of intervention sought in their initial application.

[92] I do not accept Dr. Auer's contention that I advocated on behalf of the Attorney General of Canada, or that I suggested that the Attorney General must necessarily intervene in opposition to Dr. Auer's application. The Court's objective throughout was to facilitate the hearing of this application on the merits and to protect the Court and its process. Dr. Auer presented as a very determined and, at times, uncooperative litigant. His counsel was similarly forceful, indeed aggressive, in his representation of his client and in his insistence that this challenge to the *Guidelines* was a purely private matrimonial application.

[93] I am similarly not persuaded that a reasonable person, properly informed, viewing the matter realistically and practically, and having thought the matter through, would conclude that my attempts to manage this highly contentious issue leads to a conclusion that I would not decide this issue fairly.

In raising the possible application of section 24 of the *Judicature Act, RSA 2008, c J-2*, I have actively advocated for the Attorney General.

[94] During the April 27, 2016 appearance, Dr. Auer's counsel advised that he intended to provide the Attorney General with notice of his application "as a matter of courtesy". At that point I indicated that "you must give them notice-given the nature of the - what the challenge is, they're entitled to at least be aware" [Transcript: April 27, 2016, page 5, lines 3–6]. At the same time, I specifically acknowledged that serving notice did not mean they were entitled to participate and "that may be an argument for a different day".

[95] Subsequently, during the October 10, 2017, appearance, counsel for the Attorney General, in response to a question from the court about the applicability, or possible applicability, of the *Judicature Act* provisions affording standing to the Provincial and Federal Attorney General as of right, responded: "I'm sorry, Sir, I – – I'm not familiar enough with the *Judicature Act* provisions to formulate a reasonable response." [Transcript: October 10, 2017, page 4, line 4-5].

[96] With respect, this response from counsel for the Attorney General of Canada was surprising and, frankly, unhelpful. The possible application of s 24 of the *Judicature Act*, was, under all of the circumstances, somewhat obvious. If nothing else, it was the logical starting point for a consideration of a possible role of the Attorney General in defending federal legislation.

[97] Courts rely on counsel to assist them in moving matters forward and, most particularly, in providing legal argument and legal authority that is relevant to the matter under consideration. Faced with what I would respectfully describe as an unhelpful response from counsel for the Attorney General of Canada, I then sought the assistance of counsel for Dr. Auer, as evidenced in the following exchange:

> The Court: What do you have to say about my question to Ms. Charlton about the *Judicature Act*?
>
> Mr. Solomon: My Lord, I think we have tread over this. I have indicated that it applies as a narrow exception to the prescription and common law to the Attorney General participating in proceeding in which it is not a named party and that the exception could have been broader if the legislature sought to have it broader. It is not, and it does not provide the answer to this application.
>
> The Court: But do you want an opportunity to make further submissions on this point?
>
> Mr. Solomon: If there are further submissions from the Attorney General, I would want to respond to them but they have not brought their application under the *Judicature Act*.
>
> The Court: Well, but whether they brought it under the *Judicature Act* or not, can I simply ignore it if that's what I believe applies?

[98] I have difficulty accepting Dr. Auer's contention that inviting counsel to provide submissions on an issue of interest or concern to the Court leads to a legitimate concern that the Court was someone actively advocating for the Attorney General of Canada. Even if I was wrong in my assessment as regards the possible applicability of this provision of the *Judicature Act*, how does raising the issue with counsel and seeking their input lead to an allegation of bias? No authority has been cited for the proposition that a judge is somehow prohibited from asking counsel to provide submissions on a relevant legal matter not raised by the parties in written or oral argument. I find support for the notion that a judge may properly raise an issue not addressed by counsel in the decision of LeGrandeur Prov J in ***R v Y (LS)***, 2006 ABPC 336. In that instance, the judge refused to recuse himself after having unilaterally raised a constitutional issue ignored by the parties. At para 77, he held that courts have the jurisdiction to: (1) "raise the constitutional validity of a statute or any portion thereof" (even if not raised by the parties); and (2) "issue the notice as required by s 24 of the *Judicature Act*, R.S.A. 2000 c J-2".

[99] In this instance, the possible applicability of s 24(1) of the *Judicature Act* was a live issue from the outset of the proceedings in the Court of Queen's Bench of Alberta. When directed to serve both Attorneys General with notice of his intended challenge to the *vires* of the Guidelines, on April 27, 2016, counsel for Dr. Auer advised that he intended to do just that as a matter of courtesy. He now appears to place great weight on the fact that he was directed to serve notice of his *vires* challenges on both Attorneys General, even though he had already advised the court that he intended to do just that as a matter of courtesy.

[100] In my view, there is no merit to the Applicant's contention in this regard. I am satisfied that Dr. Auer's expressed intention to service notice as a matter of courtesy reflected an active awareness that his challenge to the *vires* of the *Guidelines* would be of interest to one or both Attorneys General. After more than two years of active litigation with the Attorney General of Canada relative to this same issue, Dr. Auer's action in serving notice to both Attorneys General, but particularly the Attorney General of Canada, must be taken as reflecting his knowledge and awareness that the Attorney General of Canada's interest in the issue would continue as the matter shifted to the Court of Queen's Bench of Alberta.

[101] I am not persuaded that a reasonable person, properly informed, viewing the matter realistically and practically, and having thought the matter through, would conclude that my raising an issue not addressed by either Dr. Auer or the Attorney General of Canada, and seeking the assistance of counsel relative to that issue, leads to a conclusion that I would not decide this issue fairly.

V. Conclusion

[102] In ***Al-Ghamdi***, Hillier J referred to the presumption of impartiality as arising "from the long and hallowed traditions of the Courts and from the judge's oath to be impartial (at para 79). At para 80-81, he went on to state:

> Thus, it is my obligation as a judge, true to my oath, to consider whether my ability to the strong presumption, described by the Supreme Court of Canada, lead to three corollaries : the onus to rebut the presumption lies on the party seeking recusal; there is a high burden of proof; and the grounds for seeking recusal must be both fact specific and contextual. It is not enough to infer an appearance of bias

> merely because of a lengthy relationship with a law firm that appears before the judge as counsel.
>
> The test is whether the relationship predisposes me or would raise a reasonable apprehension in the reasonable and informed person that I would be predisposed to a certain result or demonstrates that I have a closed mind or that a reasonable and informed person would believe that I have a closed mind.
>
> An analysis of the concerns raised before me must start with the presumption of impartiality as a keystone in our judicial system. That presumption underlies the integrity and responsibility of the judicial branch of government. Justice Veit's comments in ***LMB v IJB*** highlight the tension between the apparently easy answer that if bias is raised, you simply withdraw, with the more complex obligation each justice owes to his or her oath, to the parties, to fellow judges, and to the administration of justice. If there is no evidentiary basis for a reasonable apprehension of bias, recusal represents an abdication of responsibility.

[103] As I stated in ***Steele*** (at para 29): "Public confidence in the independence and impartiality of the judiciary is a matter of the utmost importance in our democracy…As such, I approach this allegation of reasonable apprehension of bias with great care, mindful of the significant public interest in safeguarding the integrity of an impartial judiciary". My judicial oath of office requires me to follow the law and to discharge my responsibilities in accordance with the best interests of our judicial process. In the absence of a proper basis for a reasonable apprehension of bias, I agree with Hiller J's assertion (at para 92) that "recusal represents an abdication of responsibility".

[104] I am satisfied that no reasonable apprehension of bias has been established in this instance. In order to rebut the presumption of impartiality, clear evidence and serious grounds must be established by the party seeking recusal. In my respectful view, they do not exist here. The application for recusal is, accordingly, dismissed.

1) Should the Attorney General of Canada be Granted Intervenor Status?

[105] There is support in case law for the proposition that the Attorney General is entitled to intervene in a private law dispute when an applicant seeks a declaration that an enactment is *ultra vires* its enabling statute: see ***Alberta (AG) v Kazakewich***, [1937] SCR 427, 1937 CarswellAlta 57 at para 3 (SCC); ***Charter Airways Ltd v Canada (AG)***, 1 DLR (2d) 110, 1955 CarswellAlta 71 (Alta CA).

[106] I am also satisfied that the Attorney General of Canada should be granted intervenor status pursuant to either Rule 2.10 of the *Alberta Rules of Court*.

A. Intervention is Justified Pursuant to Rule 2.10 of the *Alberta Rules of Court*

[107] Rule 2.10 is the general provision authorizing this Court to grant intervenor status:

> 2.10. On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

[108] In ***Gauchier v Alberta (Registrar, Metis Settlements Land Registry)***, 2014 ABCA 272 at para 6, the Court of Appeal cautioned that "[t]he granting of intervener status is discretionary and

should be exercised sparingly... The Court should be cautious not to allow interveners to expand the lawsuit, delay proceedings or prejudice a party."

[109] In ***Suncor Energy Inc v Unifor, Local 707 A***, 2014 ABQB 555 at para 8, Wittmann C.J. (as he was then) outlined the relevant considerations when applying Rule 2.10:

> ... [T]he considerations are as follows:
>
> > 1. Will the proposed interveners be specially or directly affected by the decision of the Court: *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320, [2005] A.J. No. 1273 (Alta. C.A.) at paragraph 2; *Knox v. Conservative Party of Canada*, 2007 ABCA 141 (Alta. C.A.) at paragraph 5; *Alberta (Minister of Justice) v. Métis Settlements Appeal Tribunal*, 2005 ABCA 143 (Alta. C.A.) at paragraph 4; *R. v. Finta*, [1993] 1 S.C.R. 1138 (S.C.C.), at 1143; *Carbon Development Partnership v. Alberta (Energy & Utilities Board)*, 2007 ABCA 231, [2007] A.J. No. 727 (Alta. C.A. [In Chambers]) at paragraph 10.
> >
> > 2. Will the proposed interveners bring special expertise or insight to bear on the issues facing the Court: *Papaschase* at paragraph 2; *Goudreau v. Falher Consolidated School District No. 69*, 1993 ABCA 72 (Alta. C.A.) at paragraph 17. This question is akin to whether an intervener would provide "fresh information or fresh perspective". *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335 (S.C.C.), at 340; *Stewart Estate v. 1088294 Alberta Ltd.*, 2014 ABCA 222 (Alta. C.A.) at paragraph 7.
> >
> > 3. Are the proposed interveners' interests at risk of not being fully protected or fully argued by one of the parties: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2002 ABCA 243 (Alta. C.A.) at paragraph 2; *Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel)*, 2008 ABCA 391 (Alta. C.A.) at paragraph 6; *Metis Settlements Appeal Tribunal* at paragraph 4.
> >
> > 4. Will the interveners presence "provide the Court with fresh information or a fresh perspective on a constitutional or public issue": *Reference re Workers' Compensation Act, 1983 (Newfoundland)* at 340; *Papaschase* at paragraph 9.

[110] Another factor is whether granting a right to intervene would unduly prejudice a party.

[111] In ***Papaschase Indian Band No 136 v Canada (AG)***, 2005 ABCA 320 at para 6, the Court of Appeal also noted that courts are generally more lenient in their approach to intervention applications where the case has a constitutional dimension or involves constitutional issues.

i. The Attorney General will be Specially or Directly Affected

[112] I am satisfied that the Attorney General will be specifically or directly affected by a declaration that the *Guidelines* are *ultra vires* the *Divorce Act*. If the *Guidelines* were found to be *ultra vires*, it would fall directly to the Attorney General to take action to preserve Canada's federal child support framework.

[113] The Minister of Justice, who also acts as Attorney General, is responsible for the development and maintenance of Canada's federal child support framework, of which the *Guidelines* are a fundamental part. Should the *Guidelines* be found to be *ultra vires*, it will disrupt the framework which supports the determination of child support under the *Divorce Act* in nine of the ten provinces and all three territories in Canada. At that point, it would fall to the Minister of Justice to remediate and rework the *Guidelines*. In other words, the *Guidelines* are more than just an ordinary piece of federal legislation, particularly in terms of scope and reach.

ii. The Attorney General will bring Special Expertise and Insight

[114] I accept that the Attorney General will bring special expertise and insight to bear in the examination of the *Guidelines*. This special expertise and insight is evident even in Dr. Auer's own submissions. For example, part of Dr. Auer's challenge impugns the validity of the *Guidelines* based on the federal government's decision to allow the Province of Quebec to develop its own separate regime relative to the determination of child support in that province. As the architect of this separate scheme, the Attorney General is able to provide the necessary insight into the federal government's policy and research processes that ground both of these child support regimes.

[115] In resisting the participation of the Attorney General in this *vires* analysis, Dr. Auer argues that the Attorney General has not presented enough evidence to articulate any special expertise and insight on this matter. At the same time, Dr. Auer concedes that the Attorney General has played a special role in the development of the *Guidelines*.

[116] On the evidence before me, it is clear that the *Guidelines* came into force in 1997, together with section 26.1 of the *Divorce Act*, following extensive consultation with legal organizations, women's groups, academics, and many other interested parties. The development of the *Guidelines* was also the product of extensive collaboration between various federal departments and also with provincial and territorial governments. The central player in all of this collaboration has been the Minister of Justice. Under such circumstances, it seems unlikely that any other party exists who can claim to bring as much special knowledge and expertise regarding the *Guidelines* as the Attorney General.

iii. The Attorney General's Interests will not be Fully Protected or Argued

[117] I am satisfied that the Attorney General's interests will not be fully protected or argued without intervenor status. Refusing the Attorney General's application will effectively permit Dr. Auer to challenge the *vires* of the *Guidelines* unopposed. As previously indicated, Aysel Auer has elected not to participate in the *vires* challenge beyond the filing of an affidavit. Therefore, without the Attorney General's participation, this Court may well find itself in a situation where it is called upon to make a significant decision touching on an important government initiative on the basis of the evidence and arguments presented by the Applicant alone.

iv. The Attorney General will Provide a Fresh Perspective on a Constitutional and Public Issue

[118] I cannot accept Dr. Auer's contention that this matter is simply a private family law dispute with no constitutional or public law dimension, a position that he has vigourously asserted from the outset of this particular application. There are clearly constitutional elements (as will be discussed in the next section). Further, there is a clear public interest in determining the legitimacy of the federal child support formula.

[119] Dr. Auer contends that the determination of the vires of the *Guidelines*, as between himself and Ms. Auer, will only affect his specific family law dispute. However, the very nature of Dr. Auer's requested relief – a declaration that the *Guidelines* are *ultra vires* the *Divorce Act*, or unlawful, invalid or illegal, and of no force and effect – clearly demonstrates otherwise. A declaration that the *Guidelines* are invalid as applied to Dr. Auer will, by natural extension, open the door to a finding of invalidity as applied to every other Canadian.

v. The Attorney General's Participation will not Unduly Prejudice Any Other Party

[120] Dr. Auer makes several arguments in opposition to the Attorney General's proposed role as intervenor. For example, Dr. Auer contends that the Attorney General is seeking to "take sides" in a private dispute and, in effect, step into Ms. Auer's shoes and argue the merits of her position. Dr. Auer also suggests that granting the Attorney General party-like rights in this proceeding would prevent himself and Ms. Auer from possibly resolving their dispute, including entering into any sort of consent order, without the concurrence of the Attorney General. With respect, all of these arguments misconstrue the role that the Attorney General seeks to play in these proceedings.

[121] I am satisfied that the Attorney General's application to intervene pursuant to Rule 2.10 is limited to a discrete issue – the *vires* of the *Guidelines* – and nothing more. As such, the Attorney General wants to ensure that this Court has all of the relevant material that is required to rule on that specific matter. There is nothing in the material before me that suggests the Attorney General has any direct interest in participating in the determination of Dr. Auer's applications to reduce his current child support obligations on account of undue hardship or otherwise.

[122] Based on the considerations outlined in ***Suncor*** and ***Papaschase***, I find that the Attorney General of Canada is entitled to intervenor status pursuant to Rule 2.10.

B. Does Section 24 of the *Judicature Act* Apply?

[123] Dr. Auer contends that the Attorney General's role in the development of the *Guidelines*, or any other piece of legislation, does not clothe her with the right to automatically intervene in any litigation touching on it. He concedes that different considerations would apply in litigation raising questions of constitutional validity, but argues that this is not such a case. The Attorney General also takes the position that Dr. Auer's *vires* challenge does not raise any issues of constitutional validity.

[124] Section 24 of the *Judicature Act* grants the Attorney General of Canada intervenor status in any challenge to federal legislation that raises a question of constitutional validity:

> **24(1)** If in a proceeding the constitutional validity of an enactment of the Parliament of Canada or of the Legislature of Alberta is brought into question, the enactment shall not be held to be invalid unless 14 days' written notice has been given to the Attorney
>
> **(2)** When in a proceeding a question arises as to whether an enactment of the Parliament of Canada or of the Legislature of Alberta is the appropriate legislation applying to or governing any matter or issue, no decision may be made on it unless 14 days' written notice has been given to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta.

...

(4) The Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta are entitled as of right to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the proceeding.

...

(6) If the Minister of Justice and Solicitor General of Alberta or counsel designated by the Minister of Justice and Solicitor General of Alberta appears in a proceeding within Alberta in respect of a question referred to in subsection (1) or (2), the Minister of Justice and Solicitor General of Alberta is deemed to be a party to the proceeding for the purpose of an appeal from an adjudication in respect of that question and has the same rights with respect to an appeal as any other party to the proceeding.

[125] The court acknowledges the briefs filed by both counsel for Dr. Auer and counsel for the Attorney General relative to this issue raised by the Court on October 10, 2017. In light of the conclusions advanced by both Dr. Auer and the Attorney General regarding the inapplicability of s 24 of the *Judicature Act*, as well as my decision relative to Rule 2.10, it is not necessary for me address this issue.

2) What is the Appropriate Scope of the Attorney General of Canada's Intervention?

[126] Rule 2.10 is silent on the scope of intervention that is appropriate when a court grants intervenor status pursuant to this rule. Rule 2.10 does not specify whether this Court has the power to grant the Attorney General the status of a full party.

[127] The Attorney General relies on the Ontario decision in ***North American Financial Group Inc v Ontario (Securities Commission)***, 2017 ONSC 2965, as support for the argument that she is entitled to party status. However, in ***Stratum Projects Alberta Inc v Aman Building Corp***, 2017 ABQB 351 at paras 21-28 , Master Schlosser notes that the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, explicitly allow for intervention as an added party, whereas the *Alberta Rules of Court* do not contain similarly explicit language. As such, Master Schlosser questions whether Rule 2.10 contemplates granting party status to an intervenor.

[128] Generally, Alberta case law cautions that the scope of any intervention should be limited to only what is required for a court to make a proper determination on the issues before it: ***R v Hirsekorn***, 2011 ABQB 156 at para 21. An intervenor should generally not be allowed to introduce new issues or enlarge the issues already before the court. In the current circumstances, however, where this Court is faced with an otherwise unopposed challenge to the *vires* of the *Guidelines*, the Attorney General is, in my view, entitled to participate fully in this process.

[129] Accordingly, the Attorney General of Canada is granted intervenor status with rights and duties comparable to that of a party, which includes:

(a) The right to cross-examine on the previously specified affidavits for no more than one day;
(b) The right to make oral and/or written submissions on any aspect of the vires application, including evidentiary and jurisdictional issues;

(c) The right to put public documents before the Court to establish legislative and social facts concerning the development and implementation of the Guidelines; and
(d) The right to appeal an adverse decision.

[130] The Attorney General's right to appeal stems from the *Alberta Rules of Court*, which allows appeals from a party to an action heard before the Court of Queen's Bench: ***Peavine Metis Settlement v Whitehead***, 2015 ABCA 366 at paras 50-52.

[131] It is also applicable regardless of whether Rule 2.10 contemplates an intervenor being given party status. Even if Rule 2.10 does not contemplate party status, I would still grant the Attorney General party-like status, including the right to appeal, due to the extraordinary nature of Dr. Auer's otherwise unopposed *vires* challenge to the *Guidelines*.

Heard on the 9th day of June, 2017, and continued on the 11th day of August, 2017, the 10th day of October, 2017, and the 6th day of February, 2018.
Dated at the City of Calgary, Alberta this 29th day of June, 2018.

M. David Gates
J.C.Q.B.A.

Appearances:

G. Solomon Q.C.
for Dr. R. Auer

D. Kiss
for Dr. A. Auer

D. Charlton & C. Regehr
for the Applicant Attorney General of Canada

RAND KISS TURNER LLP
Barristers & Solicitors

Richard W. Rand, Q.C.
Denise J. Kiss
Gregory D. Turner (Inactive)
Catherine M. Scott

10316 - 124 Street
EDMONTON AB T5N 1R2
TEL: (780) 423-1984
FAX: (780) 423-1969

Our File: 47-699 DJK
Your File: 11823 001

December 14, 2017

Via Fax 403-571-1528

Jensen Shawa Solomon Duguid Hawkes LLP
Barristers and Solicitors
800, 304 - 8 Avenue SW
Calgary AB T2P 1C2

COPY

Attention: Glenn Solomon, Q.C.

Dear Sir:

RE: Auer v. Auer

We have reviewed Mr. Justice Gates' letter dated December 11, 2017 and have now had the opportunity to speak to Dr. Aysel Auer. If we understand correctly, as part of your argument being advanced in opposition to the Attorney General's application for Intervenor status, you are now suggesting that Mr. Justice Gates should recuse himself as the Case Management Justice and refrain from deciding that application.

Mr. Justice Gates has made it clear that his involvement in this matter would end after the hearing of the Intervenor application. We have been advised of this now on several occasions. As your concerns appear to relate to matters that have arisen during the course of Dr. Roland Auer's Federal Child Support Guideline challenge and the Attorney General's Intervenor application, and as Dr. Aysel Auer is not taking a position on those applications, we do not believe it would be appropriate for us to take a position on your application to have Mr. Justice Gates recuse himself either.

We do find it a bit odd that one of your arguments relates to the fact that the proceedings have continued to be heard in Calgary despite neither party residing in that jurisdiction. We recall this specific issue being raised during one of the earlier Case Management meetings and we certainly understood your position at that time to be that, as both Dr. Roland Auer's counsel (yourself) and Mr. Justice Gates were in Calgary, and as Dr. Aysel Auer was not taking a position on either the Intervenor application or Dr. Roland Auer's Federal Child Support Guideline challenge, it was appropriate for those matters to be heard in Calgary. It was contemplated that the other applications, that have been held in abeyance, would ultimately be heard in Edmonton.

In any event, Dr. Aysel Auer intends to take no position on this issue. You are certainly at liberty to forward a copy of this correspondence to Mr. Justice Gates. As with the Federal Child Support Guideline challenge and the Intervenor Application, if Dr. Roland Auer proceeds to file a formal application requesting Mr. Justice Gates' recusal, Dr. Aysel Auer will file a response Affidavit only if she feels there are factual inaccuracies in Dr. Roland Auer's materials.

Sincerely,

RAND KISS TURNER LLP

Per: DENISE J. KISS

cc: Darcie Charlton, Cam Regehr - via email
cc: Micah Chartrand - via email
cc: Dr. Aysel Auer - via email

In the Court of Appeal of Alberta

Citation: JH v Alberta (Minister of Justice and Solicitor General), 2019 ABCA 420

Date: 20191101
Docket: 1901-0249-AC
Registry: Calgary

Between:

J.H. and Alberta Health Services

Respondents
(Respondents)

- and –

Minister of Justice and Solicitor General of Alberta

Respondent
(Appellant)

- and -

Legal Aid Society of Alberta, Calgary Legal Guidance, and the Canadian Civil Liberties Association

Applicants
(Not Parties to the Appeal)

Reasons for Decision of
The Honourable Madam Justice Jolaine Antonio

Applications for Permission to Intervene

Reasons for Decision of
The Honourable Madam Justice Jolaine Antonio

[1] In *JH v Alberta Health Services*, 2019 ABQB 540 [Reasons], a justice of the Court of Queen's Bench declared that various provisions in the *Mental Health Act*, RSA 2000, c M-13 infringe sections 7, 9, 10(a) and 10(b) of the *Charter* and are therefore of no force or effect: Reasons at para 317. Alberta has appealed that declaration. The Legal Aid Society of Alberta, Calgary Legal Guidance (CLG), and the Canadian Civil Liberties Association (CCLA) seek leave to intervene in the appeal.

[2] A single justice of this Court may grant permission to intervene and impose conditions on the intervention. Interveners cannot raise novel issues unless permitted: Rules 14.37(2) and 14.58 of the Alberta Rules of Court, AR 124/2010.

[3] As explained in *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2005 ABCA 320 at para 2,

> ... as a general principle, an intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court. As explained by the Supreme Court of Canada in *R. v. Morgentaler*, 1993 CanLII 158 (SCC), [1993] 1 S.C.R. 462 at para. 1: "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."

[4] On numerous occasions, this Court has identified factors that can play a role in the assessment of these criteria:

1) Will the intervener be directly affected by the appeal;

2) Is the presence of the intervener necessary for the court to properly decide the matter;

3) Might the intervener's interest in the proceedings not be fully protected by the parties;

4) Will the intervener's submission be useful and different or bring particular expertise to the subject matter of the appeal;

5) Will the intervention unduly delay the proceedings;

6) Will there possibly be prejudice to the parties if intervention is granted;

7) Will intervention widen the *lis* between the parties; and

8) Will the intervention transform the court into a political arena?

Eg at *Styles v Canadian Association of Counsel to Employers*, 2016 ABCA 218 at para 15; *R v Vallentgoed*, 2016 ABCA 19.

[5] A party that obtained intervener status at the trial level must apply anew for intervener status at the appellate level. Its prior involvement will not be determinative of the application, but it can be a favourable factor: *Suncor Energy Inc v Unifor Local 707A*, 2016 ABCA 265 at paras 15, 20. The following considerations are relevant:

(a) the role taken by the interveners in the court below;

(b) whether the submissions of the interveners were necessary or helpful in informing the decision being reviewed;

(c) whether the issues on appeal are the same as in the court below, or whether the issues as framed on appeal could continue to impact the applicants' interests;

(d) whether the particular perspective of the applicants can continue to inform the discussion as now framed on appeal.

[6] Alberta opposes the applications of CLG and CCLA. It does not oppose the application of the Legal Aid Society. JH supports all the intervention applications.

[7] I am satisfied that the Legal Aid Society has met the test for intervention; its application is allowed. For the reasons that follow, CLG's application is allowed and CCLA's application is dismissed. Conditions on the interventions are set out at the end of these reasons.

CLG's application

[8] CLG intervened in this matter in the Court of Queen's Bench. According to its filed memorandum, it will "again focus its submissions on the rights in sections 7, 9, and 10 of the *Charter*, taking the position that the structural deficiencies affecting these rights in the impugned sections of the [*Mental Health Act*] cannot be justified under section 1".

[9] CLG submits that it meets the test for intervention because it provides legal services and advocates on behalf of clients who are impacted by the complex constitutional issues surrounding the impugned provisions in the *Mental Health Act*. It also argues that it has developed institutional knowledge of the *Act* that other parties to the appeal do not have, and that its input was helpful below, as indicated by multiple references to its submissions in the trial judge's reasons.

[10] According to the Affidavit of Marina Glockman, sworn September 19, 2019, CLG provides legal services and advocates on behalf of "economically and socially disadvantaged persons who would not otherwise have access to such services". It is "one of the only organizations in Alberta that provides pro bono legal representation to low-income individuals facing legal issues arising out of the *Mental Health Act*". As a result, CLG has "developed special expertise in this area ... informed by the experiences of many individuals of varying sophistication, education and ability who have ben patients in Alberta's mental health care system." CLG's clients often "have difficulty advocating for themselves because of their mental disorder."

[11] Alberta opposes CLG's application on several grounds. First, it suggests that CLG is not an organization made up of individuals directly affected by the appeal; rather, some of the clients it represents might be affected. It relies on *Styles*, as a relevant factual comparator, and for one of the factors it listed as informing the court's determination of intervener status: Will the proposed intervener be directly affected by the appeal?

[12] The *Styles* case involved issues of employment law and contracts. The proposed intervener was a not-for-profit group consisting of in-house lawyers who advised employers; it was not made up of employers. This court held that the lawyers represented by the proposed intervener had no more direct interest in the outcome than any lawyers who advise employers. Further, the interpretation of a contract held little precedential value, and in any event "the precedential value of a case does not constitute a direct interest such as to justify intervener status": *Styles* at paras 24 to 28.

[13] In *Styles*, a combination of factors resulted in the group of lawyers being denied intervener status. The case does not establish a rule that groups made up of lawyers cannot obtain intervener status on issues that affect their clients. As is apparent from even a cursory review of Supreme Court jurisprudence, groups consisting primarily of lawyers frequently obtain intervener status.

[14] Whether the proposed intervener will be "directly affected by the appeal" is one factor among many that can be considered in deciding the core question of whether the proposed intervener will be "specially affected by the decision" or "has some special expertise or insight" to offer: *Styles* at para 15; *Papaschase* at para 2. This factor should not be interpreted as suggesting that only affected individuals can intervene, or that representative bodies or other organizations cannot: eg *PT v Alberta*, 2018 ABCA 312 at para 5. In considering whether an organization will be "specially affected" or has "special expertise", a court may have regard to the organization's constituency, mandate, experience, or other relevant features: eg *Johnsson v Lymer*, 2019 ABCA 113 at paras 12, 21. At the same time, courts will guard against granting intervener status to organizations whose interest is "purely jurisprudential": *North Bank Potato Farm Ltd v The Canadian Food Inspection Agency*, 2019 ABCA 88 at para 5; *Papachase* at para 8; *Styles* at para 28. Interveners must be able to demonstrate a sufficiently tangible connection to the matter before the court.

[15] I am satisfied that CLG plays a unique role in serving under-served sectors of the community, and that it has gained unique knowledge and insight from working with individuals who are subject to the *Mental Health Act*. Both from the perspectives of representation and expertise, it is a suitable candidate for the role of intervener. Of course, I must go on to determine whether it will "present the court with submissions which are useful and different" and that will assist in deciding the appeal: *Morgentaler* at para 1, quoted in *Papaschase* at para 2.

[16] Alberta submits that CLG's application may cause undue delays in the appeal; will widen the questions between the parties; and does not indicate what submissions it intends to make or how they will be helpful in resolving issues that invoke well-developed legal tests and principles.

[17] The possibility of delay can be managed by the imposition of conditions.

[18] Alberta asserts that it "did not attempt to justify any potential *Charter* breaches as a reasonable limit under section 1 of the *Charter* and will not do so on appeal"; therefore CLG;s proposed submissions on s 1 would impermissibly expand the issues. Having now received Alberta's factum, CLG acknowledges that s 1 will not be a live issue before this court, and therefore will not form part of CLG's submissions.

[19] CLG's application is weakened by its failure to state its intended position. As this Court stated in *Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238 at para 13,

> The court's ability to assess whether an intervener has something useful and different to add is tied to how clearly the intervener articulates the submissions they seek to advance. A bare assertion that one has a unique perspective is far less helpful than an overview of the arguments the intervener seeks to advance. The Supreme Court requires applicants to identify the position of the intervener intends to take, set out the submissions to be advanced, the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

[20] Applying *Suncor*, I find that CLG's prior status as intervener favours its application. Alberta objects that, though CLG's submissions were referenced in the trial reasons, it appears they largely overlapped the submissions of JH. Again, I feel this concern can be managed through the imposition of conditions.

[21] Turning to some of the other factors set out in *Styles* at para 15, I am satisfied that CLG's presence will assist the Court in deciding the matter, and will help to protect the interests of individuals who may be affected by the impugned provisions of the *Mental Health Act*. I see no realistic possibility of prejudice to the parties flowing from CLG's intervention.

[22] Having considered all relevant factors, I grant CLG's application on the conditions set out below.

CCLA's application

[23] CCLA submits that it will provide a national perspective to the appeal and proposes to make submissions on two main points: 1) the need for robust oversight mechanisms in the *Mental Health Act* to protect the interests of individuals detained under its authority, and 2) the law of capacity specific to the psychiatric context, as applied to the legal limits to and conditions of involuntary treatment. CCLA submits that it meets the test for intervention because of its experience in providing submissions to legislative and policy bodies in mental health legislation across Canada.

[24] Alberta argues that CCLA is not directly affected by the appeal; it will widen the *lis* between the parties; it will unduly delay proceedings; and its submissions will either be unhelpful or duplicative.

[25] On its first proposed topic, CCLA's focus will be on "what an Act which grants [detention] powers ought to ensure", or how oversight contributes to constitutional sufficiency, as illustrated in part through an analysis of legislation from other provinces. It is not clear to me how the idea of oversight will be concretely applied in the case at bar; I fear it may do more to obscure the issues than to illuminate the answers. Further, a focus on what the law should do can be appropriate in a case that will develop the common law, but I am not satisfied that the proposed submissions will assist in determining whether the impugned provisions of the *Mental Health Act* are constitutionally compliant. I am concerned that they would amount to proposals for optimizing or re-drafting the *Act*, which is not the role of the Court. In a sense, the proposed submissions would risk transforming the Court into a political – or at least a legislative – arena: *Styles* at para 15.

[26] I agree with Alberta that CCLA's second proposed topic exceeds the scope of the appeal. The trial judge declined to comment on the capacity and treatment questions, in part due to an insufficient evidentiary foundation: Reasons at paras 225, 262. Submissions on these topics would impermissibly expand the issues on appeal: *Alberta (Minister of Justice) v Metis Settlements Appeal Tribunal*, 2005 ABCA 143 at para 5, citing *Deloitte & Touche v Ontario (Securities Commission)*, 2003 SCC 61 at para 31; *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2017 ABCA 280 at paras 18-20.

[27] Though CCLA has a long and laudable record of assisting legislators and courts on important rights-related issues, I am not satisfied that it will offer appropriate or useful submissions in this case. I therefore do not find it necessary to consider whether it will be specially affected or possesses special expertise.

[28] Having considered all relevant factors, I dismiss CCLA's application.

Conclusion and conditions

[29] In conclusion, Legal Aid Society of Alberta and CLG are each granted permission to intervene, subject to the following conditions:

a) Legal Aid Society of Alberta shall file and serve a factum not exceeding 12 pages on or before December 19, 2019.

b) CLG shall file and serve a factum not exceeding 20 pages on or before December 19, 2019.

c) The interveners are prohibited from raising new issues or adducing further evidence or otherwise supplementing the record.

d) The interveners shall make best efforts to avoid duplicating the submissions of any other party.

e) Alberta is granted permission to serve and file a single factum not exceeding 12 pages in reply to both interventions on or before January 13, 2020.

f) Each intervener is provisionally granted permission to present oral argument not exceeding 20 minutes at the hearing of the appeal. The panel may reduce or rescind that time if, after reviewing all the written materials, it is of the view that the intervener's submissions are unlikely to be helpful.

g) No costs shall be awarded to or against the interveners.

h) Transcript Management is authorized to unseal the transcripts of all hearings and appearances in this action for the limited purpose of providing copies of same to the Court and counsel to each party, including interveners, upon request, without charging any fees. The transcripts shall otherwise remain sealed and not be released for any other purpose.

i) The Case Management Officer will decide, in consultation with the parties and interveners, whether the date currently set for the hearing of the appeal remains suitable. Any new date shall be set no later than March 1, 2020, unless I direct otherwise.

Application heard on October 31, 2019

Reasons filed at Calgary, Alberta
this 1st day of November, 2019

Antonio J.A.

Appearances:

S.F. Janmohamed
for the Respondent, J.H.

G.D. Chipeur, QC
J.W. Wilikie
for the Respondent, Alberta Health Services

L.H. Riczu
L. McDaniel
by teleconference for the Respondent, Minister of Justice and Solicitor General of Alberta

D. Tan
for the Applicant, Legal Aid Society of Alberta

G.Y.L. Chen
L. Livingstone
for the Applicant, Calgary Legal Guidance

S.E. Rankin
S. Channan
for the Applicant, Canadian Civil Liberties Association

sum of £10,000, and the objects of the recommendation were the children of the daughter. I am of opinion, that the husband could not have claimed the legacy in right of his wife, and that the wife could not have claimed it for her own use. A settlement upon the wife and children was intended by the testator to be made by the husband and wife. The wife being dead, the settlement cannot be made; and I of opinion, that the children are entitled equally. It was argued that the subject was uncertain, because the testator recommended, that besides the £10,000 of his own, something of the husband's to be settled also; but there being certainty as to that which was in the testator's power, the trust as to this does not fail, because the testator expressed a wish as to something over which he had no power. His wish or recommendation that the husband should settle something of his own is perfectly consistent with his wish or recommendation that the whole of the £10,000 should be settled, whether the husband settled anything or not.

[148] KNIGHT *v.* KNIGHT. *Dec.* 17, 18, 19, 20, 21, 1839; *August* 7, 1840.

[S. C. 9 L. J. Ch. (N. S.), 354; 4 Jur. 839; and in House of Lords (sub nom. *Knight* v. *Boughton*), 11 Cl. & F. 513; 8 E. R. 1195; 8 Jur. 923. See *Holmesdale* v. *West*, 1866, L. R. 3 Eq. 485; *Shelley* v. *Shelley*, 1868, L. R. 6 Eq. 544; *Ellis* v. *Ellis*, 1875, 44 L. J. Ch. 226; *In re Oldfield* [1904], 1 Ch. 553.]

Principles of construction, in cases of precatory words in wills, and the requisites to enable the Court to construe them as imperative.

Where property is given absolutely to one, who is by the donor recommended, intreated, or wished, to dispose of it in favour of another, the words create a trust, if they are such as ought to be construed imperative, and the subject and objects are certain: thus, if a testator gives £1000 to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum or any certain part to C. D., a trust is created in favour of C. D.

Bequest to A. B. of a residue, with a recommendation to him after his death to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, has been considered sufficiently certain both as to subject and object, as to create a trust.

Where it is to be collected that the donor did not intend the words to be imperative, or if the first taker was to have a discretionary power of withdrawing any part of the subject from the object of the wish, or if the objects, or the interests they are to take, are not ascertained with sufficient certainty, no trust is created.

A testator, R. P. K., was entitled to real estates in tail male, with remainder to his cousins in tail, with remainder to himself in fee as right heir of the settlor, as to part under a settlement, made by his grandfather, and as to other part under the will of his same grandfather. R. P. K. suffered a recovery and acquired the fee-simple. He afterwards made his will, by which he devised all his estates, real and personal, to his brother T. A. K., if living at his decease, and if not to T. A. K.'s son, T. A. K. the younger, and in case he should die before the testator, to his eldest son or next descendant in the direct male line; and in case he should leave no such descendant, to the next male issue of his said brother, and his next descendant in the direct male line; but in case that no such issue or descendant of his said brother or nephew should be living at the time of his, the testator's decease, to the next descendant in the direct male line of his said grandfather, according to the purport of his will under which the testator inherited those estates which his industry had acquired, &c. He constituted the person who should inherit his said estates his sole executor and trustee, to carry the same and everything therein duly into execution, "confiding in the approved honour and integrity of his family to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which he made out of so large a property according to the plain and obvious meaning of his words:" he then gave some small legacies, and proceeded thus: "*I trust to the liberality of my successors to reward*

any others of my old servants and tenants according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather." T. A. K. survived the testator. Held, that the words were not sufficiently imperative, and that the subject intended to be affected, and the interests to be enjoyed by the objects, were not sufficiently defined to create a trust in favour of the male line, and that T. A. K. took the property unfettered by any trust in favour of such male line.

Richard Knight being entitled to the manors of Leintwardine and Downton, executed an indenture of settlement, dated the 26th of April 1729, and made between himself and Elizabeth his wife of the **[149]** first part; his four sons, Richard Knight the younger, Thomas Knight, Edward Knight, and Ralph Knight, of the second part; and William Bradley and Joseph Cox of the third part: and it was thereby witnessed that the said Richard Knight, for the love and affection which he bore to his said wife and sons, and for settling an annuity by way of jointure upon his wife in lieu of dower, and "*for settling and assuring the hereditaments hereinafter mentioned, to continue in the name and blood of the said Richard Knight the elder, so long as it should please Almighty God,*" &c.; and to the end that the hereditaments might be settled and established to and for the uses, intents, and purposes, and upon and under the powers, provisoes, limitations, and agreements after expressed, he, the said R. Knight, conveyed the manors of Leintwardine and Downton, and the hereditaments therein described, to trustees, to the use of himself for life; and after his decease, to the use, intent, and purpose, that his wife might receive the annuity therein mentioned, with powers of distress and entry, and subject to the annuity, and the remedies for the recovery thereof, to the use of Richard Knight the younger and his assigns for life; with remainder to the use of the trustees, to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other sons of the body of the said Richard Knight the younger, on the body of his then wife to be begotten, and the heirs male of such sons; with remainder to the use of the sons of the body of the said Richard Knight the younger, begotten on the body of any other wife in tail male; with remainder to the use of his son Thomas for life; with remainder to the sons of Thomas successively in tail male; with remainder to the use of his son Edward and his assigns for his life; with remainder to the sons of Edward successively in tail male; with **[150]** remainder to the use of his son Ralph and his assigns for life; with remainder to the sons of Ralph successively in tail male; with remainder to the use of the right heirs of Richard Knight, the settlor himself; the deed contained powers of jointuring and leasing.

Richard Knight, by his will dated the 27th day of October 1744, devised his real estates to trustees, to the uses, trusts, intents, and with and upon and under the same powers, provisoes, limitations, and agreements as he had theretofore settled, conveyed, and assured the manor of Leintwardine; and he directed the residue of his personal estate to be laid out in the purchase of lands, to be settled to the same uses.

The testator died on the 6th of February 1745, leaving his four sons surviving him. Richard, the eldest son, died in 1765, without leaving any issue male. Thomas, the second son, who died in 1764, was the father of the testator Richard Payne Knight and of Thomas Andrew Knight. Edward, the third son, who died in 1780, was the grandfather of the Plaintiff John Knight, and of the Defendant Thomas Knight. Ralph, the fourth son, died in 1754, leaving two sons, both of whom died long ago without issue male. (See the pedigree in the next page.)

The eldest son, Richard Knight, enjoyed the estates until his death in 1765, and was succeeded by his nephew Richard Payne Knight, who held the estates until his death in 1824.

Richard Payne Knight being tenant in tail of the estates, suffered common recoveries thereof, and having thereby barred the entail, became the owner thereof in fee.

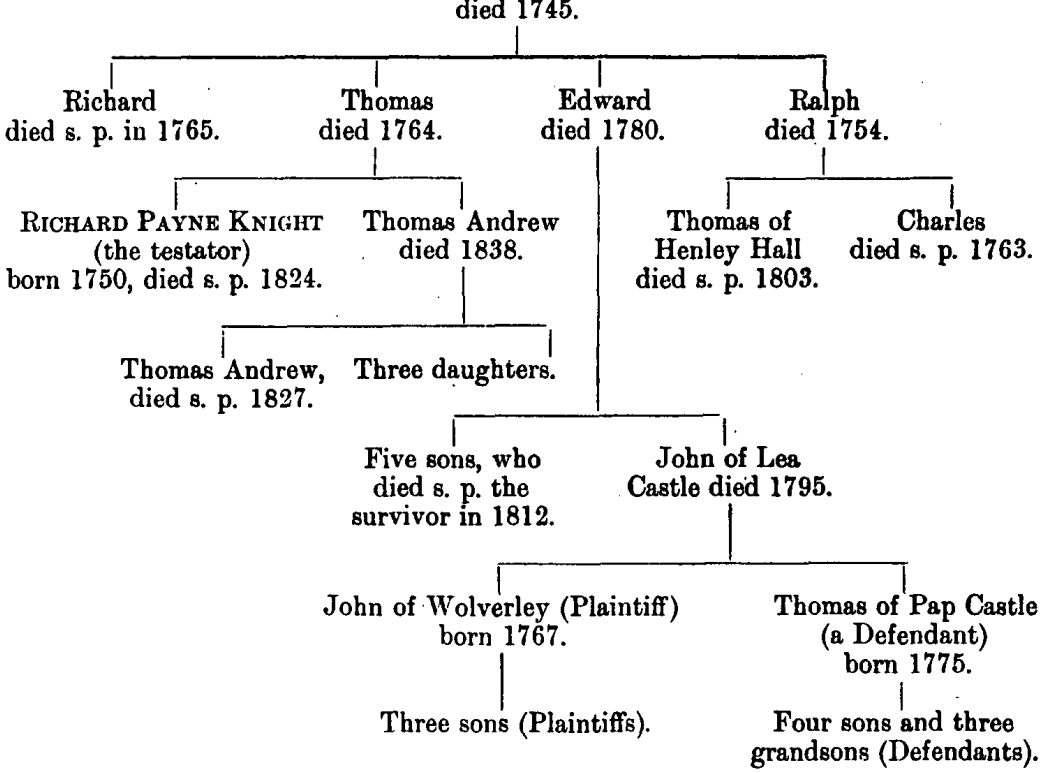
[151] On the 3d of June 1814 he made his will. At that time, his nearest relation, and the next male descendant from Richard Knight his grandfather, was his brother Thomas Andrew Knight, who had an only son, Thomas Andrew Knight, the younger; after his brother and nephew, the next male descendants from Richard

Knight the grandfather, were the Plaintiff John Knight and his sons, and the Defendant Thomas Knight and his sons.(1)

The will was expressed as follows:—"I give and bequeath *all my estates*, real and personal (except such parts as are hereinafter excepted), to my brother Thomas Andrew Knight, should he be living at the time of my decease; and if not, to his son Thomas Andrew Knight the younger; and in case that he should die before me, to his eldest son or next descendant in the direct male line; and in case that he should leave no such descend-**[152]**-ant in the direct male line, to the next male issue of my said brother, and his next descendant in the direct male line; but in case that no such issue or descendant of my said brother or nephew shall be living at the time of my decease, to the *next descendant in the direct male line of my late grandfather, Richard Knight of Downton, according to the purport of his will, under which I have inherited those estates which his industry and abilities had acquired, and of which he had therefore the best right to dispose;* subject, nevertheless, and liable in every case to the following reservations and deductions out of the rents and profits thereof, which I give and bequeath to the purposes and in the manner following, viz.: in the first place, I give and bequeath the sum of £300, to be distributed, within one month after my decease, among the poor of the several parishes of Downton, Barrington, Aston, Elton, Leinthall, Starkes, and the northern division of Leintwardine, all in the county of Hereford, in such portions to each individual pauper or poor family as my executor, or such person as he shall appoint for that purpose, shall think equitable and expedient, on condition that no diminution of the parish allowance to any person receiving the same shall be made in consequence thereof."

"And I do hereby constitute and appoint the person who shall inherit my said estates under this my will *my sole executor and* TRUSTEE, *to carry the same and every thing contained therein duly into execution; confiding in the approved honour and integrity of my family, to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which I make out of so large a property, according to the plain and obvious meaning of my words;* accordingly I give and bequeath in the second place, out of the said reserved rents and profits, the weekly sum of 25s. of good and

(1) PEDIGREE.



lawful money of Great Britain to my faithful old servant Ann Payne, **[153]** to be paid into her hands every seventh day, commencing from the day of my decease, so long as she shall live. And I also give and bequeath the sum of £3 weekly out of the said reserved rents and profits, to be paid in the same manner into the hands of Caroline Elizabeth Gregory, commonly called Ford, of No. 44 Wells Street, Oxford Road, London, as a reward for the affectionate kindness and sincerity with which she has always behaved towards me."

"And I moreover give and bequeath all coins and medals, and all wrought and sculptured articles in every kind of metal, ivory, and gems or precious stones, together with all descriptive catalogues of the same, and all drawings, and books of drawings of every kind, which shall be found in the gallery or western room of my house in Soho Square, to the British Museum, on condition that, within one year after my decease, *the next descendant in the direct male line then living of my above-named grandfather* be made an hereditary trustee, with all the privileges of the family trustees, to be continued in perpetual succession to his next descendants in the direct male line, so long as any shall exist (see 5 G. 4, c. 60); and in case of their failure, to the next in the female line; and also on condition that all duties and other expenses attending the taking possession of and removing the said articles be paid out of the funds of the said Museum. I had, in a will which I hereby revoke, bequeathed these articles to the Royal Academy; and it is not out of any change of sentiment or disrespect towards that body that I now alter that bequest, but because I think that, under the regulations now adopted in the Museum, they will be of more service to the academicians and students, as well as to the public at large, if added to those of my late respected friends Townley and Cratchrode, so as to **[154]** make one great collection, such as no other nation can boast, and afford a more complete comparative view of the rise and progress of imitative art than is anywhere else to be obtained. *I trust to the liberality of my successors, to reward any others of my old servants and tenants according to their deserts, and to their justice, in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather, Richard Knight.*"

Richard Payne Knight died the 29th of April 1824, and his brother Thomas A. Knight proved his will.

The state of the family was not altered during the time which elapsed between the date of this will and the death of Richard Payne Knight.

Thomas Andrew Knight took possession of the estates, and certain indentures, dated the 27th and 28th days of December 1825, and made between Thomas Andrew Knight of the first part, Thomas Andrew Knight the younger of the second part, and Thomas Pendarves Stackhouse of the third part, were executed: whereby after reciting that it was apprehended that Thomas Andrew Knight was not made subject to or bound by any trust of the will of R. P. Knight; or if bound by a trust, that he might exercise or perform the same trust, by settling the devised real estate on Thomas Andrew Knight the younger, his only son in tail male, and by settling the personal estate on him and the heirs male of his body, subject nevertheless to an estate for the life of himself therein; and that T. A. Knight, with the consent and approbation of his said son, had determined to settle the said real and personal estate accordingly; it was witnessed that he conveyed the said real estates to a trustee and his heirs, to the use of Thomas Andrew Knight for life, **[155]** without impeachment of waste; with remainder to the use of Thomas Andrew Knight the younger, and the heirs male of his body lawfully issuing; with remainder to the use of Thomas Andrew Knight in fee, subject nevertheless to the trusts, if any, created by the will of the said R. P. Knight, and which were not thereby performed and duly executed. By the same deeds the personal estate was limited to a trustee, in trust to permit Thomas Andrew Knight to use the same during his life; and after his death, in trust for Thomas Andrew Knight the younger and the heirs of his body.

In Trinity term 1826, a common recovery was suffered of such of the real estates at were situate in the county of Hereford, and Thomas Andrew Knight and his son Thomas Andrew Knight the younger were vouched therein, and the uses thereof were declared to be in favour of Thomas Andrew Knight in fee.

On the 30th of November 1827 Thomas Andrew Knight the younger died intestate and without issue, and his father Thomas Andrew Knight become his legal

personal representative. The trustee of the deeds of December 1825 afterwards died, and the Defendant, Edward W. W. Pendarves, was his legal personal representative.

Thomas Andrew Knight the elder afterwards executed certain indentures, dated the 24th and 25th of April 1835, the release being made between Thomas Andrew Knight of the one part and Sir William Edward Rouse Boughton of the other part; and after reciting that doubts were entertained whether Thomas Andrew Knight was not tenant in tail at law or in equity of the lands therein mentioned, being lands devised by the will of the said Richard P. Knight, and that he was desirous and had **[156]** determined to bar the same estate tail, if any, and enlarge his estate and interest therein to a fee-simple, it was witnessed that, in pursuance of the said determination and of the statute of the 3 & 4 W. 4, c. 74, Thomas Andrew Knight conveyed the lands in Middlesex, Salop, and Gloucester, discharged of all estates in tail and interests of the nature of estates tail, to Sir William Edward Rouse Boughton and his heirs, to the use of Thomas Andrew Knight in fee. The memorial of this deed was duly enrolled.

On the 5th of February 1838 Thomas A. Knight the elder made his will; and thereby, after bequeathing certain legacies, he stated that in the lifetime of his son they had fully considered and arranged as to the settlement and future disposition of the real and personal estate of which his late brother R. P. Knight had died seized and possessed, over which they had a disposing power, and accordingly had executed the deeds of the 27th and 28th of December 1825; and that it was the avowed and fixed determination of his said deceased son, expressed to him in conferences and consultations between them on the subject of their family interests and affairs, that if it had pleased God that his said son should survive him and become possessed of the said real estate, and have no issue, he, the said son, would, in that event, settle or otherwise devise or bequeath the property of the said R. P. Knight unto or amongst or for the benefit of his three sisters Frances Acton, Elizabeth Walpole, and Charlotte Lady Boughton, or their issues, &c., in such manner as he should, under existing circumstances, for the time being and from time to time think most fitting and expedient; his said son considering that it would be, on his part, an act contrary to every principle of natural and moral justice, if, in the events of his surviving him and leaving no issue, whereby the power **[157]** of disposing of the said real estate would reside and rest solely in himself, he should pass by and disinherit those so nearly connected in blood with him as his sisters and their issue and descendants, in order to prefer and benefit remote relations' descendants in the male line of his great grandfather Richard Knight; and that therefore, as under the calamitous and heavily afflicting event which had happened in the death of his son the power and right of disposing of the real estate of his brother, as well freeholds in fee and for lives, as copyholds, and also his personal estate, had devolved on him, he thereby, in accordance with the wishes and intentions of his son, &c., and in the events before mentioned, and also according to his own sense of justice, and wish and desire in all things, made his said will, and thereby devised and bequeathed all his real estates, comprising as well those which were his late brother's as his own (with certain exceptions), to Sir W. E. R. Boughton and Charlotte his wife, and such son as therein mentioned of the said Sir W. E. R. Boughton and Charlotte his wife. And in case it should thereafter be decided that he had not the power of disposing of the estates and property which belonged to his late brother, but which upon the assumption and full conviction that they did belong to him, and that he had such power, he had included in the aforesaid general devise, then he devised his own estate in the manner therein mentioned. He then stated his will to be, that the costs, &c., of the said Sir W. E. R. Boughton, and every other party interested in his will, in establishing his right to the estates of his late brother, and of any appeal to the House of Lords, should, in case the decision should be pronounced against his claim, and such costs should not be decreed to be paid out of such estate of his said late brother, be charged upon and payable out of his own copyhold and leasehold estates.

[158] And the same testator, after giving various other directions by his will, further provided, that if by the judgment it should be ultimately decided that he had not the right and power of disposing of the said real and personal estates of his said brother, &c., as he had done by that his will, then, and in such case only, and if under

any devise and bequest, limitation, or power in his said brother's will contained, he was, in consequence of failure of his own issue male, authorized and empowered to direct the order of succession, and appoint the real and personal estate, &c., to such one or more of the male descendants of his grandfather, Richard Knight, as he should think most proper, he thereby in exercise of his best judgment and discretion, and in order to continue and preserve the real estate in the male line of the family descended from Richard Knight, by limiting and appointing the same in manner after mentioned to the persons in succession, whom he considered the most likely to keep and preserve the same in the family, but subject to the previous devises and bequests, gave and devised the real estates which were the property of his late brother to his cousin the Defendant, Thomas Knight of Pap Castle, for life, and after his death to John Knight, his second son, and the heirs male of his body lawfully issuing, with other remainders over.

Thomas A. Knight the elder died in May 1838.

Previously, however, to this event, John Knight, who was the male heir of Richard Knight of Downton who died in 1745 (see pedigree, 3 Beav. 151 (n)), together with his three sons, filed this bill in May 1836, against Thomas Andrew Knight the elder and others; praying a declaration that according to the true construction of the will of Richard Payne **[159]** Knight deceased, all the real and all the residue of the personal estates of Richard Payne Knight ought to be conveyed and assigned in such manner as best to secure the enjoyment thereof to the male descendants of Richard Knight the grandfather, as long as the rules of law and equity would permit; and that the same ought to be so limited that Thomas Andrew Knight should have a life-estate therein, with such remainder to his issue male and to the Plaintiffs as might best answer the purposes aforesaid, and for accounts, &c.

Subsequently to the date of his will, Thomas Andrew Knight the elder put in his answer to the original bill in this cause, and thereby claimed under the will of Richard Payne Knight, with or without the aid of the further title derived under the indentures of the 27th and 28th of December 1825, and the indenture of the 23d day of March 1826, and the recovery suffered, and the said indentures of the 24th and 25th of April 1835, to be absolutely entitled to the whole of the real estates of the testator, Richard Payne Knight, in fee-simple and under the said will, or as next of kin of Thomas A. Knight the younger deceased, to be absolutely entitled to the leasehold and personal estate of the said testator.

Thomas Andrew Knight, as before stated, died on the 11th of May 1838, without having revoked or altered his will; and the necessary parties having been brought before the Court by a bill of revivor and supplement, and the preliminary enquiries having been made by the Master, the causes now came on for hearing.

The question in the cause was, whether the precatory words in the will of Richard P. Knight were imperative on Thomas A. Knight.

[160] Mr. Pemberton, Mr. G. Turner, Mr. J. Humphry, and Mr. Menteath, for the Plaintiffs. The dispositions contained in the will of the testator, Richard Payne Knight, imposed an imperative trust on his brother, Thomas Andrew Knight, to settle the property in the direct male line of the testator's grandfather, Richard Knight.

It has been now firmly established by a long series of decisions, "that whenever a person gives property, and points out the object, the property, and the way in which it shall go, that creates a trust; unless he shews clearly, that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." "If a testator shews a *desire* that a thing shall be done, unless there are plain express words or necessary implication, that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust;" *Malim* v. *Keighley* (2 Ves. jun. 335). To create by precatory words such a trust as the Court will carry into execution, there are three requisites; *first*, the precatory words must be sufficiently clear; *secondly*, there must be a certainty as to subject of the gift; and, *thirdly*, the objects to take must be certain; *Wright* v. *Atkyns* (Turner & Russ. 157), *Cary* v. *Cary* (2 Sch. & Lef. 189), *Cruwys* v. *Colman* (9 Ves. 322), *Morice* v. *The Bishop of Durham* (10 Ves. 535), *Paul* v. *Compton* (8 Ves. 380).

As to the first requisite, no particular form of words is necessary; it is sufficient for a testator "to express a *desire* as to the disposition of the property, and the desire

so expressed amounts to a command; *Cary* v. *Cary*. Thus "request," *Eade* v. *Eade* (5 Mad. 118); "desire," **[161]** *Harding* v. *Glyn* (1 Atk. 469); "my particular wish and request," *Foley* v. *Parry* (5 Sim. 138, and 2 Myl. & K. 138); "my last wish," *Hinxman* v. *Poynder* (5 Sim. 546); "recommend," *Tibbits* v. *Tibbits* (19 Ves. 656); *Horwood* v. *West* (1 Sim. & St. 387); *Malim* v. *Keighley* (2 Ves. jun. 333); "entreat," *Prevost* v. *Clarke* (2 Mad. 458, n.); "my dying request," *Pierson* v. *Garnet* (2 Bro. C. C. 38, and 226, and Pr. in Ch. 200, n.); "not doubting," *Parsons* v. *Baker* (18 Ves. 476); "trusting and wholly confiding," *Wood* v. *Cox* (1 Keen, 317, and 2 Myl. & Cr. 684); in short, "any words of recommendation and desire in a will are always expounded a devise," *Eales* v. *England* (Pr. Ch. 200). They also cited on this point *The Duchess of Buckingham's case* (2 Ves. jun. 530), and 1 Jarm. Pow. Devises, 355.

By the civil law, from which most probably the principle was adopted by Courts of Equity, "words of request or confidence *rogo, volo, mando, injungo, desidero, deprecor, fidei tuæ committo, scio te hæreditatem meam restituturum Titio,* are those by which a *fidei commissum* is created; but effect is given to a *fidei commissum*, if it can be collected from any expressions in the instrument that it was the grantor or testator's intention to create it" (2 Burges Comm. 106): and like a declaration of a use in equity, where there has been a transmutation of possession, "any expression whereby the mind of the party may be known that such a one shall have the land is sufficient;" *Jones* v. *Morley* (12 Mod. 159).

Secondly, the subject of the gift is sufficiently certain, being the estates and personal property devised and bequeathed by the will.

[162] Thirdly, the persons to take are sufficiently defined being persons in the male line in succession; a description much more perfect than the expressions "family," "relations," which have been held sufficiently certain to be carried into execution; *Harding* v. *Glyn* (1 Atk 470), *Cruwys* v. *Colman* (9 Ves. 322).

Applying these principles to the present case, the Court finds the testator "TRUSTS to the justice of his successors in continuing the estates in the male succession, according to the will of the founder of the family, his above-named grandfather Richard Knight;" and he "appoints the person who shall inherit his estates his sole executor and TRUSTEE, to carry the same and everything contained therein duly into execution, *confiding* in the approved honour and integrity of his family to take no advantage of technical inaccuracies." These words of trust and confidence are much stronger than many which have occurred, besides which, the person inheriting was also distinctly appointed a *trustee* to carry the will into execution. The clause respecting the hereditary trustee of the British Museum and the first gift over, in case of there being no issue of Thomas A. Knight and his son living at the testator's death, shew how anxious the testator was to keep up the distinction of the direct male line of his grandfather.

If, then, this be a trust binding on Thomas Andrew Knight, he was bound to carry it into effect by a settlement of the property, so as to run so far as was possible in the male order of succession. This was a trust to be executed by him; and the distinction between trusts executed and executory has always been recognised and admitted; *Mortimer* v. *West* (2 Sim. 282), *Jervoise* v. *The Duke of* **[163]** *Northumberland* (1 Jac. & W. 570), 1 Preston Abst. 135. The estate ought, therefore, to have been settled so as to give successive life-estates to the parties *in esse; Leonard* v. *The Earl of Suffolk* (2 Vern. 526), *Papillon* v. *Voice* (2 P. Williams, 470), *White* v. *Carter* (Amb. 670), *Humberston* v. *Humberston* (1 P. Williams, 332), *Hopkins* v. *Hopkins* (1 Atk. 593). In *Lord Dorchester* v. *The Earl of Effingham* (G. Coop. 319, and *post*, p. 180, n.; and see 2 Pow. Devises, 443), a testator, having a power of revocation and new appointment, directed "his estates to be attached to his title as closely as possible," it was held that the effect of his will was to abridge the estates of all persons *in esse*, in the line of the title, from estates tail to estates for life. In *Woolmore* v. *Burrows* (1 Sim. 512), lands were to be purchased and closely entailed to the family estate; and it was decided that every person *in esse* at the testator's death must have life-estates, and no more.

The difficulty of making a settlement so as to meet every event will probably be relied on by the other side; but the Court has frequently, as in several of the cases already referred to, overcome that objection. The same argument was used in *Pierson* v. *Garnet* (2 Bro. C. C. 38); but there it was met by the Court in these terms: the

difficulty and impracticability of carrying the trust into execution has been pressed: "That argument has no weight with me; because if an express trust had been raised, it must have been executed, though it would have been attended with all the same difficulties and impracticabilities stated in this case. However arduous the trust was, the Court must have carried it into execution."

[164] Mr. Spence, Mr. Coote, and Mr. Phillips, for the Defendant Thomas Knight of Pap Castle and his children, concurred in the argument of the Plaintiffs, that the precatory words used by the testator Richard Payne Knight were imperative upon Thomas Andrew Knight; but they contended that he had, by implication, a power of selection amongst the male descendants of the founder of the family; and that it had been duly executed by the will of Thomas Andrew Knight in favour of John Knight and his family; *Brown* v. *Higgs* (4 Ves. 708). That the only object of the testator R. P. Knight was to continue the property in the male line, to the exclusion of females; and there were many events which might happen, as the bankruptcy, insolvency or insanity of the elder male branches, which would render such a power of selection in T. A. Knight absolutely necessary to carry out the intention of the testator of continuing the estates in the family.

THE ATTORNEY-GENERAL [Campbell], Mr. Tinney, Mr. Wilbraham, and Mr. Hodgson, for the widow of the testator and for Mrs. Acton, his daughter, and Pendarves, a trustee;

Mr. Kindersley and Mr. K. Parker, for Sir W. Boughton and children; and

Mr. Richards and Mr. Torriano, for Mrs. Walpole, who claimed under the will of Thomas Andrew Knight, *contrà*, argued to the effect following. The testator, Thomas Andrew Knight, became absolutely entitled to the real and personal estate of his brother Richard Payne Knight, under the will of the latter, unfettered with any trust; or, supposing him to have taken an estate tail under the will, yet by means of **[165]** the recoveries it became afterwards converted in a fee-simple absolute.

The principle of holding precatory words to be imperative has been frequently disapproved of, and the current of modern authority is strongly against it. Lord Chief Baron Richards, speaking of the former decisions on the subject, thus expressed himself (10 Price, 265), "I hope to be forgiven if I entertain a strong doubt whether, in many, or perhaps in most of the cases, the construction was not adverse to the real intention of the testator.

"It seems to me very singular, that a person who really meant to impose the obligation established by the cases, should use a course so circuitous, and a language so inappropriate and also obscure, to express what might have been conveyed in the clearest and most usual terms—terms the most familiar to the testator himself, and to the professional or any other person who might prepare his will. In considering these cases, it has always occurred to me, that if I had myself made such a will as has generally been considered imperative, I should have never intended it to be imperative; but, on the contrary, a mere intimation of my wish that the person to whom I had given my property should, if he pleased, prefer these whom I postponed to him, and who, next to him, were at the time the principal objects of my regard.

"I am happy to be enabled to state, that in this opinion I have the concurrence of a noble Judge, than whom there has never been, and, I believe, never can be, a person more active and acute in investigating the principles of the law in all its bearings, or more extensively learned on every legal subject."

[166] "In *Wright* v. *Atkyns* (1 Ves. & B. 315), Lord Eldon says, 'This sort of trust is generally a surprise on the intention, but it is too late to correct that.' Again, he says, 'We know the question was, what the word family meant? I do not believe that the testator intended a mere trust, but that must be the construction, if the word "family" is properly construed.' I have said so much as a justification, or rather the foundation, of the opinion which I entertain, that, though I hold myself bound by the decisions, and obliged to follow them, I do not consider it to be my duty to extend the rule of construction which has been adopted in them, and to add to the number of those where the Court appears to me rather to have made than to have given effect to the wills of testators."

In the same case Lord Redesdale said, that "all cases of this description were to be considered with very considerable strictness, as it was a very inconvenient mode of disposition:" *Meredith* v. *Heneage* (1 Sim. 566). And Sir Anthony Hart observes, as

to this equity, that "The first case that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them. The current of decisions has, of late years, been against converting the legatee into a trustee:" *Sale* v. *Moore* (1 Sim. 540), and see *Lawless* v. *Shaw* (1 Lloyd & Goold, 154, and 165, n.; 5 Cl. & Fin. 129; 1 Drury & W. 512).

The words used by the testator are not, and were not, intended to be, imperative upon his successors. There are three instances in which he expresses his confidence; first, he "*confides* in the *approved honour and integrity* of his family to take no advantage of tech-**[167]**-nical inaccuracies, but to admit all the small reservations out of the property; secondly, he *trusts* to the *liberality* of his successors to reward old tenants and servants; and, thirdly, he trusts to their *justice* in continuing the estates in the male succession." In neither of these cases was it the intention of the testator to bind his family, and in every of them he would have deprecated the interference of this Court. If his wishes had been consulted, they undoubtedly would have been to have continued the estate in the family *for ever*. He was aware that this could not be effected by any legal means; he knew that he could not effectually settle his estate so as to be unalienable, further than the minority of the first tenant in tail; and he therefore considered the best mode to accomplish his wishes was to trust to the *honour* of his successors, and to impose on them what is termed "an imperfect obligation," which was to be binding morally only.

His intention, so far as can be collected, was to create a perpetuity, which the law will not allow, and which the Court cannot carry into execution; but taking it to be his wish to settle the estates "according to the will of the founder of the family," then the will of 1744 must be the scheme and model for effecting it. Under that will, Thomas Andrew Knight the elder would have been tenant in tail, and that estate has been barred, and converted into a fee-simple absolute. Again, at the date of the will of 1744, Richard Knight appears to have had seven grandchildren living, who were the children of his son Edward, yet he did not attempt to limit life-estates to the two generations, but gave estates tail to the children of Edward. If then this will is to be taken as a model, the settlement to be made would be very different from that asked by the Plaintiffs, namely, to limit successive life-estates to all the persons *in esse;* **[168]** or, as is stated in the prayer of the bill, to convey estates "in such manner as best to secure the enjoyment thereof to the male descendants of Richard Knight the grandfather of the testator, *so long as the rules of law and equity will permit;*" but would have been to Thomas A. Knight for life, with remainder to T. A. Knight the younger in tail.

This case has none of the requisites for enabling the Court to say, that the property is fixed with a positive trust in favour of the Plaintiffs.

First, the words are not sufficiently strong to be construed imperative. The testator trusts to their *justice*, a word clearly importing no legal obligation.

In *Harland* v. *Trigg* (1 Bro. C. C. 142) there was a gift to his brother of leaseholds, hoping he would continue them in the family, and it was held that no trust had been created. *Cunliffe* v. *Cunliffe* (Ambler, 686) was a devise to his son, recommending him if he died without issue to give and devise it to his brother the Plaintiff, and it was held that no trust had been created. In *Bland* v. *Bland* (2 Cox, 351), the testator earnestly requested the party by will to settle, and there no trust was created. In *Sale* v. *Moore* (1 Sim. 534), there was a gift to wife of a residue, recommending to her, and not doubting she would consider his near relatives, and there the decision was against there being any trust. In *Curtis* v. *Rippon* (5 Mad. 434), the testator trusted that the devisee would make such use of it as should be for her own and her children's spiritual and temporal good; remembering always, according to circumstances, the Church of God and the poor; and in *Lechmere* v. *Lavie* (2 Myl. & K. 197) where the **[169]** words were "of course they will leave what they have," &c.; and *Ex parte Payne* (2 Younge & C. 636), where the expressions were "I strongly recommend her to execute a settlement;" and *Meredith* v. *Heneage* (10 Price, 306, and 1 Sim. 542), it was successively held that no trust had been created.

The second requisite, namely, certainty in the subject, is also wanting; the property to be subject to the supposed trust is in the greatest degree of uncertainty. From the word "*continue*," one would suppose that those estates which passed by the will of Richard Knight the founder were alone to be included; as to which, however,

it seems strange that Richard Payne Knight should himself have defeated the will of his grandfather, by suffering recovery of those estates. There are, however, five distinct properties which may be the subject of the supposed trust: first, the realty settled by the deed of 1729; secondly, the realty afterwards acquired by Richard Knight, and devised by his will; thirdly, the personal estate of Richard Knight; fourthly, the real estates acquired by Richard Payne Knight; and fifthly, his personal estate. It is impossible to say, whether all or any, and which, of these different descriptions of property are to be included in the supposed trust. Again, it is clear, that the successors are to have the right of rewarding the old servants and tenants out of the property; and this, then, will have the effect of rendering the residue uncertain, and of making the trust void. *Wynne* v. *Hawkins* (1 Bro. C. C. 179); *Eade* v. *Eade* (5 Madd. 118).

Thirdly, the persons to take; the extent of their interest, and the estates they are severally to enjoy is in no way defined. How is this Court to carry such a trust into execution? What provision is to be made for jointures, **[170]** portions, leasing-powers, &c.? When are the daughters to be let in to take in default of male issue? It is impossible to carry anything so vague and uncertain into execution; and to effectuate the wish fully, a perpetuity must be created, which is contrary to law.

The wish is addressed to all successors in the most remote line; why is it to bind the first taker only?

The distinction between trusts executed and trust executory has always been admitted, but here the testator had no reference to any settlement to be executed, there is no conveyance to execute. It is true, that where a deed is to be executed, the Court will mould the limitation, so as to effectuate the general intention, "but if a party will be his own conveyancer and create the estate, the Court has no jurisdiction to alter it." *The Countess of Lincoln* v. *The Duke of Newcastle* (12 Ves. 238), *Douglas* v. *Congreve* (1 Beavan, 59). In *Gower* v. *Grosvenor*, as reported in Barnardiston (page 62), the Court seems to have considered that a conveyance was to be executed. *Humberston* v. *Humberston* was a gift to trustees to convey. In *Woolmore* v. *Burrows*, there was a direct gift to the executors to be laid out, and closely entailed to the family estate. *Lord Dorchester* v. *The Earl of Effingham* appears to have been a legal devise under a power, and the estate was to be attached to the title as closely as possible.

There is no reported case in which the Court has directed a settlement to be executed upon precatory words, and no case in which words of request have been addressed to so indefinite a series of persons as successors.

Mr. Pemberton, in reply.

[171] *August* 7. THE MASTER OF THE ROLLS [Lord Langdale] (after stating the circumstances of the case, proceeded): The Plaintiff, John Knight of Wolverley, contends, that, under the will of Richard Payne Knight, his brother Thomas Andrew Knight was bound to make a strict settlement of the real and personal estates upon the male descendants of Richard Knight the grandfather.

The Defendant Thomas Knight of Pap Castle contends, that Thomas Andrew Knight was not bound to make a strict settlement of the estates, but was bound to make some settlement thereof upon one or more of the male descendants of Richard Knight, among whom he had a power of selection, which he has duly exercised by his will.

The Defendant Sir William Edward Rouse Boughton, and the widow and daughters of Thomas A. Knight, who claim under his will contend, that he had an absolute estate and interest in the property in question, and had a power of disposition, unfettered by any trust or obligation whatever.

The principal question is, whether a trust in favour of the male descendants of Richard Knight is created by the will of the testator Richard Payne Knight.

That the testator wished that his estates, or at least, that some estates should be preserved in the male line of his grandfather, and had a reliance, or in the popular sense, a trust, that the person to whom he gave his property, and those who should succeed to it, would act upon and realise that wish, admits of no doubt. He has expressed his wish and his reliance in terms which are, to that extent, sufficiently clear.

[172] But it is not every wish or expectation which a testator may express, nor every act which he may wish his successors to do, that can or ought to be executed or

enforced as a trust in this Court; and in the infinite variety of expressions which are employed, and of cases which thereupon arise, there is often the greatest difficulty in determining, whether the act desired or recommended is an act which the testator intended to be executed as a trust, or which this Court ought to deem fit to be, or capable of being enforced as such. In the construction and execution of wills, it is undoubtedly the duty of this Court to give effect to the intention of the testator whenever it can be ascertained: but in cases of this nature, and in the examination of the authorities which are to be consulted in relation to them, it is, unfortunately, necessary to make some distinction between the intention of the testator and that which the Court has deemed it to be its duty to perform; for of late years it has frequently been admitted by Judges of great eminence that, by interfering in such cases, the Court has sometimes rather made a will for the testator, than executed the testator's will according to his intention; and the observation shews the necessity of being extremely cautious in admitting any, the least, extension of the principle to be extracted from a long series of authorities, in respect of which such admissions have been made.

As a general rule, it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust.

[173] First, if the words are so used, that upon the whole, they ought to be construed as imperative;

Secondly, if the subject of the recommendation or wish be certain; and,

Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.

In simple cases there is no difficulty in the application of the rule thus stated.

If a testator gives £1000 to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum or any certain part of it to C. D., it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish.

So, if a testator gives the residue of his estate, after certain purposes are answered, to A. B., recommending A. B., after his death, to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property, though a subject to be ascertained, and that the relations to be selected, though persons or objects to be ascertained, are nevertheless so clearly and certainly ascertainable—so capable of being made certain, that the rule is applicable to such cases.

On the other hand, if the giver accompanies his expression of wish, or request by other words, from which it is to be collected, that he did not intend the wish to **[174]** be imperative: or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request: or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus the words "free and unfettered," accompanying the strongest expression of request, were held to prevent the words of the request being imperative. Any words by which it is expressed or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule; and in such cases we are told (2 Ves. jun. 632, 633) that the question "never turns upon the grammatical import of words—they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent must be considered." And (10 Ves. 536) "wherever the subject, to be administered as trust property, and the objects, for whose benefit it is to be administered, are to be found in a will, not expressly creating a trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the Court as evidence, that the mind of the testator was not to create a trust;

and the difficulty, that would be imposed upon the Court to say what should be so applied, or to what objects, has been the foundation of the argument, that no trust was intended;" or, as Lord Eldon expresses it in another **[175]** case (Turn. & Russ. 159), "Where a trust is to be raised characterised by certainty, the very difficulty of doing it is an argument which goes, to a certain extent, towards inducing the Court to say, it is not sufficiently clear what the testator intended."

I must admit, that in the endeavour to apply these rules and principles to the present case, I have found very great difficulty; that in the repeated consideration which I have given to the subject, I have found myself, at different times, inclined to adopt different conclusions; and that the result to which I have finally arrived has been attended with much doubt and hesitation.

The testator, at the date of his will, was entitled in fee to a large real estate, and absolutely entitled to a very considerable personal estate. Of the largest part of the real estate he had been tenant in tail, under the dispositions made by his grandfather Richard Knight; he had suffered recoveries, whereby he became entitled to the same estate in fee; and the question is, whether by the will he meant to impose on his brother, Thomas Andrew Knight, the trust or duty of making such a settlement as is alleged by the Plaintiffs; or such a settlement upon some of the male descendants of the grandfather as would, under the will of Thomas Andrew Knight, give a right to the Defendant, Thomas Knight of Pap Castle; or did he mean that his brother was to have over the estate the same power which he himself had acquired and enjoyed; and which by his will he exercised for the purpose of transmitting the estate to the next male heir of his grandfather, and which he wished his successors to use in the same manner for the further transmission of the estates in the same line. And I **[176]** am of opinion, though, I admit, after great doubt and hesitation, that the testator did not intend to impose an imperative trust on his successor, and that his will ought not to be construed to have that effect.

As he who had made himself absolute owner of the property had conceived himself bound in honour to transmit it to the male line of his grandfather, so he wished the same sentiment to govern his successors. He was pleased to speak of the honour and integrity of his family, and he expressed his trust or reliance on the justice of his successors; but it does not appear to me that he intended to subject them, as trustees, to the power of this Court, so that they were to be compelled to do the same thing which he states he trusted their own sense of justice would induce them to do.

It is a common observation in all such cases, that the testator might, if he had intended it, have created an express trust; but the authorities shew that if there be sufficient certainty, and nothing in the context of the will to oppose the conclusion, the trust may and must be implied; and the question is, whether there is a trust by implication.

He gave all his estates, real and personal (except as therein mentioned), to his brother, or to the next descendant in the direct male line of his grandfather, who should be living at the time of his death. The gift is in terms which make the devisee the absolute owner, and give him the power of disposing of the whole property (with such exceptions as are mentioned) as he pleases. The exceptions, deductions, or reservations consist of certain gifts for charitable and other purposes; and he constitutes his devisee sole executor and trustee to carry his will into execution, "confiding in the ap-**[177]**-proved honour and integrity of his family to take no advantage of any technical inaccuracies;" and the context appears to me to shew, that these words relate to the reservations which he had made out of the general devise and bequest to his brother or the next descendant in the direct male line of his grandfather. The expressions used in his great bequest to the British Museum, afford additional evidence of his wish to maintain the distinction of his family in the same line; but I think that the question in the cause depends on the effect to be given to the last sentence in the will. Having given all his estates, real and personal, to his successor, that is, the next male descendant, and having given a few legacies, he says, "I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather Richard Knight."

In this passage there is no doubt of the wish, or of the line of succession, in which

the testator desired the estates (whatever he meant by that term) to devolve or be transmitted.

Contemplating his successors, and, as it would seem, all his successors without limit in that line, he says, that he trusts to their liberality for one purpose, and to their justice for another. So far as he trusts to their liberality to reward any of his old servants or tenants, according to their deserts, he cannot be understood to have intended to create an imperative trust. Notwithstanding the use made of the word "trust," an indefinite discretion was, in that respect, left with the successors; and it is difficult to suppose, that having in this sentence used the word "trust" in a sense consistent with an **[178]** indefinite discretion in the person trusted, he should, in the same sentence, use the word "trust" in a sense wholly inconsistent with such discretion;—in a sense which imposed an absolute obligation to resort to the most refined subtleties of the law for the purpose of executing a trust in such a manner as to preserve, by compulsion, the succession to the estate in the same line for the longest time possible. Admitting the wishes of the testator, which seem to me sufficiently expressed, I have found an insuperable difficulty in coming to a satisfactory conclusion that he did not intend to rely on the honour, integrity, or justice of his family or successors for the performance of his wishes, but did intend to impose upon his successors an obligation to be enforced by legal sanction: and the impression arising from the last words in the will appears to me to be increased by a consideration of the preceding parts. He gave absolute estates; as to the gifts to other persons, he confides in the approved honour and integrity of his family that no advantage will be taken of technical inaccuracies to defeat them; and as to the succession of the estates intended to pass in the line he had chosen, he trusts to their justice. It seems to me, as if he had said, "you see my sense of what is due to the founder of the family; under his will, I have inherited the estates which his industry and abilities acquired, and of which he had, therefore, the best right to dispose. I have, by my own act, made myself absolute master of the estates, but I think it just to continue the succession in the same manner: this I do by my will, and I trust to your justice to do the like." If this were his meaning, it is consistent with an intention that each successor should take from his immediate predecessor, by gift proceeding from a sense of justice, or by descent from the same motive, an absolute interest in the estates; and that the continuance in the line designated should be provided for in that way.

[179] I think, therefore, that there is great reason to doubt the intention to create an imperative trust: and looking to the subject to which his wishes were directed—observing the absolute gift of all his estates, real and personal, with certain exceptions; and that, in the last clause, he has not used the words "my said estate," or any words clearly and certainly indicating all that he had given to those whom he has called his successors, but had simply used the words, "the estates," leaving it be matter of by no means easy construction, whether he intended under that expression to include the personal estate as well as the real; and it not being certain, having regard to the subsequent reference to the will of his grandfather, whether he meant to include more than the estates of his grandfather, to which he had himself succeeded; and observing that some part of the personal estate, at least, was subjected to the liberality of his successors, I think that there is reason to doubt whether the subject is sufficiently certain for a trust of this nature.

The objects do appear to me to be indicated with sufficient certainty, and it seems to me clear in what order he wished them to take. But, unless they were to take successively as absolute owners, I cannot discover what estates they were intended to take. I have not been able to persuade myself that the testator meant to tie down his successor to make such a settlement as is proposed by the Plaintiffs, and nothing less would give the Plaintiffs any right to ask for a decree of this Court in their favour; and if I might be permitted to adapt the words of Lord Rosslyn, in the case of *Meggison* and *Moore* (2 Ves. jun. 633), to the circumstances of this case, I should say, that "if I were imperatively to declare that the successors designated by the will should take only **[180]** for life and their issue in strict settlement, I should do a thing most foreign to the testator's intention. His successor might have done what is suggested. The testator intimated a wish to him, and gave sufficient power; but I cannot say that he has left it to the Court of Chancery to accomplish his wishes."

On the whole, I am under the necessity of saying, that for the creation of a trust, which ought to be characterised by certainty, there is not sufficient clearness to make it certain that the words of trust were intended to be imperative, or to make it certain what was precisely the subject intended to be affected, or to make it certain what were the interests to be enjoyed by the objects.

It appears to me, therefore, that the Plaintiffs have not made out any title, and that the bill ought to be dismissed.(1)

Bill dismissed with costs.

(1) Lord Dorchester *v.* The Earl of Effingham. Rolls. *Feb.* 18, 19, *March* 9, 1813.

[See cases in note to *Knight* v. *Knight*, 3 Beav. 148.]

A. having a power of revocation and new appointment over an estate, of which B., his heir, was tenant in tail, by his will directed the estate "to be attached to his title as closely as possible." Held, that the estate of B. and all other tenants in tail *in esse* at A.'s death (being in line of the title) were abridged to estates for life only.

The facts of the case, as appearing by the decree, were as follows: under certain indentures, real estates were limited to the use of Guy Lord Dorchester for life, with remainder to his then eldest son Christopher for life, with remainder to Christopher's first and other sons in tail male, with remainder in succession to the other children of Guy Lord Dorchester for life, with remainder to their first and other sons in tail. A power of revocation of their uses, and of making a new appointment by deed or will, was reserved to Guy Lord Dorchester.

Christopher died in 1806, leaving the Plaintiff Arthur Henry, his eldest son, an infant.

Guy Lord Dorchester died in 1808. By his will, attested so as to pass real estate, he expressed himself as follows:—"*All my landed estates to be attached to my title as closely as possible;* all the timber woods **[181]** and trees on my estates I leave to my executors in trust to increase my landed property; all debts due to me from Government, and all my personal property not otherwise disposed of, I leave to my executors in trust to increase my landed property, all which trust shall be lodged in Bank stock, there to accumulate principal and interest, and profits arising therefrom, till my executors find an adviseable purchase adjoining to or near my estates. The executors to have a power, with the consent and approbation of Lady Dorchester, to sell my estates for the purpose of buying others, which may unite or approximate the landed property."

By a codicil unattested, he gave all the timber on his estates, and all his personal property not otherwise disposed of, to his executors in trust to increase his landed property.

After the death of Guy Lord Dorchester, his grandson Arthur Henry, then Lord Dorchester, who, under the limitations in the deeds, taken independently of the will, would have been tenant in tail, filed this bill by his guardian, praying that he "might be declared to be tenant in tail of the said settled estates, under and by virtue of the limitations of the said deeds;" that the deeds and will might be carried into execution, and for a declaration of the rights of the parties.

The parties entitled in remainder, after the limitations to the Plaintiff and his issue, insisted "that the said testator did by his said will alter the uses of the said settlement, and that he had full right and power so to do; and that upon the true construction of the said will, the Plaintiff ought to be declared to be tenant for life of the estates of the said Guy Lord Dorchester; and that they would become entitled upon the death of the said Plaintiff to successive estates for life therein, with remainder to their respective sons in tail male; and the Defendant Guy Carlton claimed to be the first tenant in tail in being of the said estates."

It appears from the registrar's note-book, that the cause came on upon the 18th and 19th of February 1813, when it was ordered to stand over for a fortnight, with liberty for the Plaintiff to amend the bill, and bring the cause again to a hearing as

he should be advised. The cause accordingly came on upon the 9th of March 1813, when

Sir S. Romilly and Mr. Trower appeared for the Plaintiff.

Mr. Leach and Mr. Courtenay, for Lady Dorchester and the Defendants to the amended bill.

Mr. Richards, for the executors.

Sir William Grant, Master of the Rolls, declared "that by the effect of the said testator's will, the estate tail of the said Plaintiff Lord Dorchester, in the said settled estates, and the estates tail of all other the male issue **[182]** or descendants (if any) of the testator *in esse*, at the time of the testator's death, in the same estates were abridged to estates for life only, with remainder to their first and other sons successively in tail male in strict settlement." (NOTE.—See this case reported on another point in G. Cooper, 319; where the former part of the will is stated.)

[182] FRANKS *v.* PRICE. *Dec.* 6, 7, 10, 11, 13, 14, 1839; *August* 8, 1840.

[S. C. 9 L. J. Ch. (N. S.), 383; and at law, 5 Bing. (N. C.), 37; 6 Scott. 710.]

A testator gave life interests in real and personal estate to A. and B., with interests to their issue male in certain events only, and the estate was given over to the heir of the testator on a general failure of issue male of A. and B. Held, that A. and B. took estates tail by implication.

A testator devised his real and personal estate to trustees, and gave life-estates therein to several persons, namely, A., B., &c.; and after their deaths he directed the trustees to pay the income to Moses and Naphthali, during their respective lives, share and share alike; and in case either of them should, *after the deaths of A., B., &c.*, depart this life without leaving issue male of his body, in trust to pay the whole income to the survivor for life; and he directed that if Moses should, *after the deaths of A., B., &c.*, die *before Naphthali, leaving issue male*, then the trustees should *convey*, a moiety of the real estate, to the use of the first and other sons of Moses in tail male, with remainder to Naphthali for life, with remainder to his first and other sons in tail, and in default to the testator's right heirs, and lay out a moiety of the personal estate in land, and convey the same to trustees to the like uses. The testator made a similar disposition *mutatis mutandis* of the other moiety in case of the death of *Naphthali, after the death of A., B., leaving issue male*, and he provided that in case Moses and Naphthali should die without leaving issue male, or if such issue male should die without leaving any issue male, the trustees should convey the property to such person as should, at the death of the survivor of Moses and Naphthali, be the right heir of the testator. It will be seen that no provision was made for the event (which happened), of *Moses dying without issue before the death of A., B.* Naphthali survived Moses and A., B., &c., and Moses died without issue. Held, first, that the words "after the deaths of A., B.," &c., did not import contingency, but were merely words of reference, shewing that the gifts then in course of expression were subject to the prior gifts, and were not to have effect in possession until those prior gifts were satisfied or had become inoperative. Secondly, that the words, "if Moses should die before the death of Naphthali, leaving issue male," must have their natural meaning, and be taken to provide only for the particular cases expressly described. Thirdly, that to effectuate the general intent, Naphthali took an estate tail by implication in both moieties of the realty, and an absolute interest in the personalty. And, fourthly, that the trusts on which the question arose were not executory so as to alter the construction as arising on an executed trust.

The question in this case arose on the will of the testator Moses Hart, and was, whether, under the will and in the events which had happened, Naphthali Hart took an estate for life, or an estate tail by implica-**[183]**-tion, in the real and personal estate of the testator. In the former case alone the Plaintiff would be entitled.

The testator, by his will, dated the 2d of April 1756 (after bequeathing several annuities and certain legacies, and specifying various personal property to which he

weight. He might win the 5 per cent. as the result of a good forecast narrowly missing the right solution, and the 2½ per cent. would be a mere consolation prize for one or more of the losers. The existence of these minor prizes does not in itself preclude the making of a genuine forecast aimed at winning the 90 per cent. The existence of such minor prizes which could only be won by chance might have some effect as an additional factor tipping the scale in a doubtful case but is not material in the present case.

I would dismiss the appeal.

LORD DIPLOCK. My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Pearson, with which I agree.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Swepstone, Walsh & Son for Gaskell, Rhys & Otto-Jones, Cardiff; Lewin, Gregory, Mead & Sons for R.H.C. Rowlands, Cardiff.*

M. G.

[HOUSE OF LORDS]

MCPHAIL AND OTHERS . . . . . APPELLANTS

AND

DOULTON AND OTHERS . . . . . RESPONDENTS

[ON APPEAL FROM *In re* BADEN'S DEED TRUSTS, BADEN AND OTHERS *v.* SMITH AND OTHERS]

1970 Jan. 13, 14, 15, 19, 20, 21; May 6 — Lord Reid, Lord Hodson, Lord Guest, Viscount Dilhorne and Lord Wilberforce

Trusts—Discretionary—Power of selection—Fund for employees—Trustees "shall" apply income—Trustees not bound to exhaust income of any year—Power to apply accumulations as though income—Whether trust or power—Whether same or different test applicable in determining validity.

A deed recited that a settlor would transfer to trustees shares in a company to form the nucleus of a fund for the benefit of the staff of the company, their relatives and dependants. Clause 9 provided:

"(a) The trustees shall apply the net income of the fund in making at their absolute discretion grants . . . in such amounts at such times and on such conditions (if any) as they think fit . . . (b) The trustees shall not be bound to exhaust the income of any year or other period in making such grants . . . and any income not so applied shall be . . . [placed in a bank or invested]. (c) The

trustees may realise any investments representing accumulations of income and apply the proceeds as though the same were income of the fund and may also . . . at any time prior to the liquidation of the fund realise any other part of the capital of the fund . . . in order to provide benefits for which the current income of the fund is insufficient."

Clause 10 provided that all benefits being at the discretion of the trustees, no person had any interest in the fund otherwise than pursuant to the exercise of such discretion.

The appellants, the settlor's executors, alleged that the deed was wholly void and claimed payment of the fund to his estate and the respondent trustees took out a summons, joining, inter alia, the appellants as defendants, for determination of certain questions on the construction of the deed. On the main question of validity, Goff J. held that the provisions of clause 9 (a) constituted a power and not a trust and that on this footing clause 9 (a) was valid.

On appeal, the Court of Appeal, by a majority, upheld the decision in favour of a power, but held also that the judge had applied the wrong test for the validity of powers, the correct test being that stated (subsequent to his decision) by the House of Lords in *In re Gulbenkian's Settlements*, and accordingly the case was remitted to the Chancery Division for reconsideration of the validity of clause 9 (a) as a power. The appellants appealed:—

Held, allowing the appeal, (1) that the provisions of clause 9 (a) constituted a trust and that the case would be remitted to the Chancery Division for determination whether on this basis clause 9 was (subject to the effects of section 164 of the Law of Property Act, 1925) valid or void for uncertainty (post, pp. 437E, 444A, B–C, 446H—447A, 449H—450D).

(2) (Lord Hodson and Lord Guest dissenting) That the test to be applied in determining the validity of trust powers was that propounded in *In re Gulbenkian's Settlements* for powers, namely, that the trust was valid if it could be said with certainty that any given individual was or was not a member of the class (post, pp. 437E, 446H—447A, 456B, C).

In re Gulbenkian's Settlements [1970] A.C. 508; [1968] 3 W.L.R. 1127; [1968] 3 All E.R. 785, H.L.(E.) applied.

Inland Revenue Commissioners v. *Broadway Cottages Trust* [1955] Ch. 20; [1954] 3 W.L.R. 438; [1954] 3 All E.R. 120, C.A. overruled.

Per Lord Reid, Viscount Dilhorne and Lord Wilberforce. Assimilation of the validity test does not involve the complete assimilation of trust powers with powers. As to powers, although the trustees may, and normally will, be under a fiduciary duty to consider whether or in what way they should exercise their power, the court will not normally compel its exercise. It will intervene if the trustees exceed their power, and possibly if they are proved to have exercised it capriciously. But in the case of a trust power, if the trustees do not exercise it, the court will do so in the manner best calculated to give effect to the settlor's or testator's intentions (post, pp. 456G—457B).

Decision of the Court of Appeal [1969] 2 Ch. 388; [1969] 3 W.L.R. 12; [1969] 1 All E.R. 1016, C.A. reversed.

The following cases are referred to in their Lordships' opinions:

Benjamin, In re [1902] 1 Ch. 723.

Blight v. *Hartnoll* (1881) 19 Ch.D. 294.
Brown v. *Higgs* (1803) 8 Ves.Jr. 561, H.L.(E.)
Brunsden v. *Woolredge* (1765) 1 Amb. 507.
Clarke v. *Turner* (1694) Free.Ch. 198.
Gestetner Settlement, In re [1953] Ch. 672; [1953] 2 W.L.R. 1033; [1953] 1 All E.R. 1150.
Gisborne v. *Gisborne* (1877) 2 App.Cas. 300, H.L.(E.)
Gower v. *Mainwaring* (1750) 2 Ves.Sen. 87.
Gulbenkian's Settlements, In re [1970] A.C. 508; [1968] 3 W.L.R. 1127; [1968] 3 All E.R. 785, H.L.(E.).
Hain's Settlement, In re [1961] 1 W.L.R. 440; [1961] 1 All E.R. 848, C.A.
Harding v. *Glyn* (1739) 1 Atk. 469.
Hewett v. *Hewett* (1765) 2 Ed. 332.
Hodges, In re (1878) 7 Ch.D. 754.
Inland Revenue Commissioners v. *Broadway Cottages Trust* [1955] Ch. 20; [1954] 3 W.L.R. 438; [1954] 3 All E.R. 120, C.A.
Kemp v. *Kemp* (1801) 5 Ves.Jr. 849.
Liley v. *Hey* (1842) 1 Hare 580.
Marlborough (Duke of) v. *Lord Godolphin* (1750) 2 Ves.Sen. 61.
Morice v. *Bishop of Durham* (1805) 10 Ves.Jr. 522.
Mosely v. *Moseley* (1673) Fin. 53.
Ogden (H. J.), In re [1933] Ch. 678.
Richardson v. *Chapman* (1760) 7 Bro.P.C. 318, H.L.(E.)
Supple v. *Lowson* (1773) 2 Amb. 729.
Tempest v. *Lord Camoys* (1882) 21 Ch.D. 571, C.A.
Warburton v. *Warburton* (1702) 4 Bro.P.C. 1, H.L.(E.).

The following additional cases were cited in argument:

Cameron v. *Inland Revenue Commissioner* [1964] N.Z.L.R. 936; [1965] N.Z.L.R. 1017 (New Zealand).
Combe, In re [1925] Ch. 210.
Gess, In re [1942] Ch. 37.
Knapp's Trust Funds, In re (Note) [1952] 1 All E.R. 458.
Leek decd., In re [1967] Ch. 1061; [1967] 3 W.L.R. 576; [1967] 2 All E.R. 1160; [1969] 1 Ch. 563; [1968] 2 W.L.R 1385; [1968] 1 All E.R. 793, C.A.
Mason, In re [1891] 3 Ch. 467.
Perowne, decd., In re [1951] Ch. 785; [1951] 2 All E.R. 201.
Saxone Shoe Co. Ltd.'s Trust Deed, In re [1962] 1 W.L.R. 943; [1962] 2 All E.R. 904.
Sayer, In re [1957] Ch. 423; [1957] 2 W.L.R. 261; [1956] 3 All E.R. 600.
Weekes' Settlement, In re [1897] 1 Ch. 289.
White's Trusts, In re (1860) John. 656.
Wilson v. *Duguid* (1883) 24 Ch.D. 244.
Wilson v. *Turner* (1883) 22 Ch.D. 521, C.A.

APPEAL from the Court of Appeal.

This was an appeal by the appellants, Robert Thomas Mitchell McPhail, Enid May Baden (widow) and Raymond Rostron Baden, from an order of the Court of Appeal (Harman, Russell and Karminski L.JJ.) dated February 5, 1969, affirming so much of the order of Goff J. dated July 12, 1967, as declared that upon the true construction of a deed dated July 17, 1941, the provisions of clause 9 (a) thereof constituted a power and not a trust.

The deed was made between Bertram Baden (the settlor), the respondent Matthew Hall & Co. Ltd. (the company) and four others. After reciting that the settlor wished "to establish a fund for providing benefits for the staff of the company and their relatives and dependants . . ." it was witnessed that the trustees therein defined should hold certain property (the fund) upon trusts therein set forth including a trust (cl. 9) under which the income of the fund was to be applicable "in making at [the trustees'] absolute discretion grants to or for the benefit of any of the officers and employees or ex-officers or ex-employees of the company or to any relatives or dependants of any such persons . . ."

These proceedings were commenced in the High Court by an originating summons dated January 14, 1963, for determination, inter alia, of the question whether upon the true construction of the deed the trusts, powers and provisions thereof for the benefit of officers and employees and ex-officers and ex-employees of the company and any relatives or dependants of such persons were (a) valid or (b) void for uncertainty or for any other reason.

The originating summons was issued by (i) Edwin Baden, (ii) the respondent Peter Duke Doulton, (iii) Sidney Kindler and (iv) the respondent Alexander Laing Pearson (who were the then trustees of the deed) as plaintiffs. By an order dated March 3, 1966, it was ordered that Edwin Baden and Sidney Kindler cease to be plaintiffs (they having then ceased to be trustees of the deed) and that the proceedings be carried on by the respondents, (i) Peter Duke Doulton, (ii) Alexander Laing Pearson, (iii) Arthur Henry James Hoskins and (iv) Denis Edward Clancey (the last two having then become trustees of the deed), as plaintiffs. The appellants, who were the personal representatives of the settlor (he died on April 4, 1960), were made defendants to the originating summons as claiming in the event of the invalidity of the trusts to be entitled to so much of the fund as represented assets contributed thereto by the settlor. The respondent Arthur Frederick Smith, who was one of the staff of the company, was made a defendant to the originating summons as claiming to be beneficially interested in the fund. The respondent, the company, was made a defendant as claiming in the event of the invalidity of the trusts to be entitled to so much of the fund as represented assets contributed thereto by the company. The respondent Joseph Frederick Norris, who was an employee of, but not one of the staff of, the company, was, by an amendment (made on July 3, 1967) to the originating summons, made a defendant as claiming to be beneficially interested in the fund. The relevant clauses of the deed were:

"1. The said fund (hereinafter called 'the fund') shall consist of the said shares of the company to be transferred as aforesaid, and any other investments money or property which may hereafter be transferred (whether by the settlor or by the company or otherwise) to and accepted by the trustees for the purposes and upon the trusts of this deed" (which was a definition comprehending only the original fund and anything which might be added to it by way of additional funds brought into the settlement).

"2. The fund shall be known as the Matthew Hall Staff trust fund

and shall be vested in the trustees who shall stand possessed thereof upon irrevocable trust to hold invest administer and dispose of the same as hereinafter provided. . . . A

" 6. (a) All moneys in the hands of the trustees and not required for the immediate service of the fund may be placed in a deposit or current account with any bank or banking house in the name of the trustees, or may be invested as hereinafter provided.

" 7. The trustees may invest the fund in any investments . . . [of which particulars were given]. B

" 9. (a) The trustees shall apply the net income of the fund in making at their absolute discretion grants to or for the benefit of any of the officers and employees or ex-officers or ex-employees of the company or to any relatives or dependants of any such persons in such amounts at such times and on such conditions (if any) as they think fit and any such grant may at their discretion be made by payment to the beneficiary or to any institution or person to be applied for his or her benefit and in the latter case the trustees shall be under no obligation to see to the application of the money. (b) The trustees shall not be bound to exhaust the income of any year or other period in making such grants as aforesaid and any income not so applied shall be dealt with as provided by clause 6 (a) hereof. (c) The trustees may realise any investments representing accumulations of income and apply the proceeds as though the same were income of the fund and may also (but only with the consent of all the trustees) at any time prior to the liquidation of the fund realise any other part of the capital of the fund which in the opinion of the trustees it is desirable to realise in order to provide benefits for which the current income of the fund is insufficient. C D E

" 10. All benefits being at the absolute discretion of the trustees, no person shall have any right title or interest in the fund otherwise than pursuant to the exercise of such discretion, and nothing herein contained shall prejudice the right of the company to determine the employment of any officer or employee. . . .

" 12. The fund shall be terminated (a) at any time if the termination is approved by all the trustees unanimously and is also sanctioned by the board of the company or (b) if the company shall go into liquidation. Thereupon the trustees shall as soon as they can conveniently do so, after paying all expenses in connection with the termination apply the fund at their absolute discretion in one or more of the following ways, that is to say—(i) in making grants as though the same were grants made pursuant to clause 9 (a) hereof, (ii) in purchasing for any beneficiary any pension or other benefits from the government or any insurance company, (iii) in transferring the fund or any part thereof as an accretion to any other fund then existing established by the company for the benefit of its officers or employees or any section thereof, (iv) in transferring the fund or any part thereof as an accretion to any fund established or agreed to be established by any company with which the company may become amalgamated under any scheme whereby the latter agrees to take into its service F G H

A all or in the opinion of the trustees a substantial number of the company's officers and employees."

The summons was heard by Goff J., who first decided that the references in clauses 9 and 12 of the deed to officers and employees referred to all employees of the company and were not limited to salaried grades of employees known as " staff."

B There was no appeal against that decision. On the main question of validity he held that the provisions of clause 9 (a) constituted a power and not a trust and that on this footing clause 9 (a) was valid. On appeal, the Court of Appeal by a majority (Russell L.J. dissenting) upheld the decision in favour of a power, but held also that the judge had applied the wrong test for the validity of powers, the correct test being that stated (subsequent to the hearing before Goff J.) by the House of Lords in *In re Gulbenkian's* C *Settlements* [1968] 3 W.L.R. 1127. The Court of Appeal therefore remitted the case to the Chancery Division to reconsider the validity of clause 9 (a) as a power.

The appellants appealed.

John Vinelott Q.C. and *Rupert Evans* for the appellants.

D Clause 9 (a) of the deed dated July 17, 1941, constitutes a trust or a power coupled with a duty whereby the trustees are prima facie obliged to distribute the whole income of the fund.

In *Morice* v. *Bishop of Durham* (1805) 10 Ves.Jr. 522 Lord Eldon held that, in order to be valid, a trust must be one which the court can control and execute and *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [1955] Ch. 20 affirmed the principle that a trust for such members E of a given class of objects as the trustees shall select is void for uncertainty unless the whole range of objects eligible for selection is ascertained or capable of ascertainment. It is otherwise in the case of a mere power or power collateral: see also *In re H. J. Ogden* [1933] Ch. 678. The above view of the law accords with the observations of Lord Upjohn, with whom Lord Hodson and Lord Guest concurred, in *In re Gulbenkian's Settlements* F [1970] A.C. 508, at p. 524.

Although it is the primary duty of trustees to distribute the income amongst the class designated by the testator or settlor the appellants would concede that in practice it is a question of fact and degree. Thus, the trustees must review the field, that is, the members of the class, but they will be entitled to exclude those members of the class whom it would be inordinately expensive to trace. Further, the trustees in exercising their powers, will G take into consideration the size of the fund, but they must exercise their discretion in a fiduciary manner and, accordingly, they must consider the respective merits of any claims.

A trust power and a mere power are distinguishable as follows: in the case of a mere power the person who can control its wrong exercise is the person entitled in default of appointment. In the case of a trust power, there H being no trust in default of appointment, it is the other objects of the discretionary trust who are entitled to prevent a wrong exercise of the discretion. *In re Saxone Shoe Co. Ltd.'s Trust Deed* [1962] 1 W.L.R. 943 is of assistance in determining the test of certainty in the *Broadway Cottages*

Trust [1954] Ch. 20 type of case. As to the " relations " case: see *Wilson* v. *Duguid* (1883) 24 Ch. 244.

It is emphasised that clause 9 (a) of the deed creates a discretionary trust and not a mere power. The validity of the distinction between a bare power and a trust power (the old name for a discretionary trust) is clearly stated by Lord Eldon in *Brown* v. *Higgs* (1803) 8 Ves.Jr. 561, 570, 571.

As previously stated the trustees of a discretionary trust must be in a position to ascertain the objects of the trust in order to make a distribution. Trustees cannot ab initio decide that they will only distribute amongst a narrow group of the class of objects for that would be to fly in the face of the terms of the trust. Thus, in the present case, the trustees cannot decide in advance that they will never distribute among temporary employees of the company.

There is an essential distinction between that uncertainty which arises because of a want of definition of the objects (which applies to both trusts and powers) and a second type of uncertainty which arises because it is impossible to ascertain the class of objects to be benefited and this latter type is fatal, as here, to the validity of a trust. It may be a supervening uncertainty, for example, because a fire or bomb damage has destroyed the existing records relating to the objects of the settlor's or testator's bounty.

The trustees must be able to ascertain the membership of the class and also they must have the means of discovering with reasonable probability who the members of the class are with the same degree of certainty that the court requires in ascertaining next-of-kin. The class must be " capable of definition," that is, capable of being constructed: *per* Lord Upjohn in *In re Gulbenkian's Settlements* [1970] A.C. 508, 524F. It is conceded that there is a wide degree of tolerance, for the court leans against uncertainty but if the court cannot even commence to ascertain the objects of the trust then it is void for uncertainty: *In re Sayer* [1957] Ch. 423.

As to the true construction of the deed, the primary submission that is made before this House was not referred to in the Court of Appeal. It is, that clause 9 is concerned with the whole income of the fund and that subclause (b) thereof is merely an administrative provision. Clause 9 (a) constitutes a trust or power coupled with a duty whereby the trustees are bound to distribute the whole income. Clause 9 (b) is no more than a provision for retention of moneys unexpended during the subsistence of the trust and that is its sole purpose. It does not offend section 164 of the Law of Property Act, 1925. Clause 9 (c) does not contain a power to accumulate despite its references to capital but it is concerned only with those investments which can be realised only with the consent of all the trustees. In so far as it is implicit in clause 9 (c) that there is a power to accumulate, it is derogation of the trust contained in clause 9 (a). The true view is that this deed contains a direction to distribute income with a power to withhold income. There is nothing in clause 10 which is contrary to the above submission. It is not possible to construe clause 9 as a provision enabling the trustees to accumulate income which passes under clause 12 on the determination of the fund.

As to the judgments below, Goff J. [1967] 1 W.L.R. 1457 accepted the fivefold classification of powers coupled with a duty to distribute and powers collateral propounded by Buckley J. in *In re Leek, decd.* [1967] Ch. 1061. That decision, however, was affirmed on different grounds on appeal ([1969]

A 1 Ch. 563) and the decision of Buckley J. was not referred to in the present case in the Court of Appeal. The judgment of Goff J. begs the real question to be determined here. The majority of the Court of Appeal in the present case relied, inter alia, on the doctrine ut res magis valeat quam pereat. In the appellants' submission that doctrine has no application in a case where the possible invalidity of a disposition arises from uncertainty in the ascertainment of the class of objects of a discretionary trust and not from un-
B certainty in the language of the trust instrument. For examples of application of the doctrine see *Norton on Deeds*, 1st ed. (1906), pp. 46 et seq. [Reference was also made to *Harding* v. *Glyn* (1739) 1 Atk. 469; *In re White's Trusts* (1860) John. 656; *In re Mason* [1891] 3 Ch. 467; *In re Weekes' Settlement* [1897] 1 Ch. 289; *Cameron* v. *Inland Revenue Commissioner* [1965] N.Z.L.R. 1017.]

Evans following.

C As to the question of uncertainty or impossibility of performance, it is an acknowledged axiom of the law of trusts that a valid trust cannot be created if the objects and purpose of the trust are not known for if necessary the court must be able to execute it.

There are two inquiries to be made: (i) the court has to peruse the language used by the settlor to determine whether it is possible to ascertain
D the objects of the trust—the semantic test. (ii) If the trustees or the court can declare that there is nothing initially obscure in the words that the settlor has used in describing the objects of his bounty the question then arises: where are these objects to be found? This is an administrative question. The issue here is: with what degree of certainty must the objects be known and what is the relevant time or times for ascertainment of the objects.

As a general proposition where there is a trust containing a wide power
E to select amongst a class the trustees must be satisfied that they know who the members of the class are at the time that they make their selection. It is a reasonable assumption that the trustees initially must know who are the members of the class to whom the income can be distributed. The settlor knows presumably who initially the objects of his bounty are but it does not follow that the settlor evinces an intention that the trustees should know the
F objects of the trust with the same degree of certainty in the case of a trust of long duration.

The test propounded in the *Broadway Cottages Trust* case [1955] Ch. 20 that it must be possible to draw up a comprehensive list of the objects may well have been too strict but the principle behind the decision is a valid and simple one and should not be disturbed. The principle is that there must be a class capable of ascertainment. The observations of Cross J. in
G *In re Saxone Shoe Co. Ltd.'s Trust Deed* [1962] 1 W.L.R. 943 and those of Lord Tomlin in *In re H. J. Ogden* [1933] Ch. 678 are the true rationale of the test laid down by *Broadway Cottages Trust* [1955] Ch. 20. If the comprehensive list test be too strict then reliance is placed on the test propounded by Lord Tomlin in *In re H. J. Ogden* [1933] Ch. 678 to the effect that a trust for such members of a given class of objects as the trustees shall
H select is void for uncertainty unless the class is capable of ascertainment.

The alternative test, that where there is doubt concerning the ambit of the class of objects the trust will nevertheless remain valid provided the trustees make reasonable inquiries and find persons who plainly come within

the class, cannot be supported for this is to execute a different trust from that created by the truster. A

E. I. Goulding Q.C. and *A. A. Baden Fuller* for the respondents.

This appeal raises the question whether the provision contained in the deed dated July 17, 1941, for the making of grants to interested beneficiaries constitutes a power or a trust. The question is raised not of course as a mere matter of language but for the purpose of ascertaining the validity of this provision. B

A distinction has been drawn between that type of provision which not only empowers the trustees to distribute the fund but positively directs them so to do—a trust power—and a provision which contains a permission or invitation to the trustees to distribute the fund or part thereof to whom they think fit among the objects—a mere power or power collateral.

In the case of powers the authorities establish that a power is sufficiently C certain and therefore valid if the trustees are able to inform any postulant whether he is or is not qualified to receive bounty. This is the test propounded in *In re Gestetner Settlement* [1953] Ch. 672 and approved by this House in *In re Gulbenkian's Settlements* [1970] A.C. 508. On the other hand, a trust power contains a fatal flaw unless at the date of its inception it is possible for the trustees to make a list of all or of substantially all the beneficiaries. It is the respondents' contention that the above distinction D as regards the test for validity between trust powers and mere powers is unsound.

What occurred in *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [1955] Ch. 20 was that questions of validity became confused with questions of ease or difficulty of performance. The true test of validity for both trust powers and mere powers is that propounded in *In re Gulbenkian's* E *Settlements* [1970] A.C. 508 in respect of powers, namely, whether it is possible for the trustees to say with certainty that any given propositus is an object of the trust or power. This obviates some of the difficulties inherent in the decision in *Broadway Cottages Trust* [1955] Ch. 20. It is surprising that for validity there should be such a great distinction between the two types of provision.

As to *Broadway Cottages Trust*, the doctrine there propounded on the F distinction between trusts and powers is a late growth. Of the authorities relied on in that case, *Morice* v. *Bishop of Durham* (1805) 10 Ves.Jr. 522 and *In re H. J. Ogden* [1933]Ch. 678 were concerned with more general issues and did not necessitate the decision in *Broadway Cottages Trust* [1955] Ch. 20, while the observations which were made in *In re Gestetner Settlement* [1953] Ch. 672, and which were developed in *Broadway*, were not G necessary to the decision in *Gestetner*.

Morice v. *Bishop of Durham*, 10 Ves.Jr. 522 is of importance since it laid down the test for the validity of a trust that it must be of such a nature that the court is able to control and administer it. The decision is authority for the proposition that English law will not recognise what is known as a "purpose trust." There the court refused to enforce a trust for benevolent H purposes. It is plain that Lord Eldon did not have in mind a discretionary trust for private purposes or such matters as the necessity of being able to compile a list of objects in coming to his decision.

In *In re H. J. Ogden* [1933] Ch. 678 three points were taken against the validity of the gift: (i) a trust to promote liberal principles was illegal; (ii) such a trust would be a purpose trust; (iii) the field of political associations having liberal principles was itself uncertain. It will be seen therefore that the argument was not directed at all to the question adumbrated in *Broadway Cottages Trust* [1955] Ch. 20, namely, of the necessity and ability to make a list of objects, but to that of vagueness of the field of objects.

In re Gestetner Settlement [1953] Ch. 672 is a very important case. It was the beginning of a campaign by the Inland Revenue to minimise the recovery of income tax by charities or poor persons who were the objects of discretionary trusts by an attack on the validity of discretionary provisions. The respondents question Harman J.'s exposition of the ratio decidendi of *Ogden* [1933] Ch. 678. In any event that exposition is obiter dictum. There was no explicit indication in *Ogden* that it was incumbent upon the trustee before making a payment to enumerate every item in the field.

Whichever form it be held the present provision takes, trust or power, the settlor has created a class of objects within which the trustees may exercise their absolute discretion and without it be held that the settlor has prescribed further stipulations they, within the limits of good faith and honesty, do not have to survey the field or comply with any other extraneous requirement. To hold that trustees cannot make a proper distribution unless they have first surveyed the field and learned something about all the objects is to read a provision into deeds of this character which their language does not warrant. *Blight* v. *Hartnoll* (1881) 19 Ch.D. 294, to which reference was made in *In re Gestetner Settlement* [1953] Ch. 672 and which was criticised in *Farwell on Powers* 3rd ed. (1916), pp. 168, 169, is far from being an authority in support of the criterion of " list making."

It is pertinent to analyse the reasoning behind the decision in *Broadway Cottages Trust* [1955] Ch. 20: (i) There is no valid trust unless the court can execute it if necessary: *Morice* v. *Bishop of Durham*, 10 Ves.Jr. 522. (ii) The court can only execute a discretionary trust by equal division among all qualified objects. (iii) If (ii) be correct, then the court cannot execute the trust unless the total number of objects is known because an equal division has to be made. (iv) It follows from (i) and (iii) that the trust is invalid if the total number of objects is not known. (v) If a provision expressed as a discretionary trust is not valid as a trust then it fails for all purposes.

There is no inflexible rule that the court can only execute a discretionary trust by equal division. The contrary argument may be put in one of two ways: it is immaterial whether what the court does is (a) a mode of executing the trust or (b) is by way of an implied trust in default of selection among all the beneficiaries equally; in either event it fails unless all the beneficiaries can be ascertained (*In re Saxone Shoe Co. Ltd.'s Trust Deed* [1962] 1 W.L.R. 943, 952). Whichever way it is formulated the respondents reject it.

The following are examples of old cases concerning dispositions in which the testator or settlor gave to the trustees a power to select among a class and where the court itself exercised the power or stated that it would do so if the trustees failed to exercise it: *Mosely* v. *Moseley* (1673) Fin. 53; *Clarke* v. *Turner* (1694) Free.Ch. 198; *Warburton* v. *Warburton* (1702) 4 Bro. P.C. 1.

In the last 150 years the courts have never exercised this positive jurisdiction in relation to discretionary trusts which they did formerly as the above three cases show. The courts, however, have not been deprived of this jurisdiction by statute and they have continued so to exercise it in certain circumstances in what are known as the " relations " cases. But faced now with the growth of large benevolent trusts the courts are entitled to declare that they have never lost this particular jurisdiction and to order the master in such cases to report on the best method of distributing the fund in question. For an instance of this House on appeal exercising the powers of the court of Chancery and ordering a trustee to execute a discretionary trust according to the perceived intention of the truster see *Richardson* v. *Chapman* (1760) 7 Bro.P.C. 318. This case shows that in earlier times where there was a discretionary trust to select among a class of objects, a court of equity would select in default of selection or malpractice in selection by the trustees.

It is true that in *Kemp* v. *Kemp* (1801) 5 Ves.Jr. 849, at p. 858 Sir Richard Arden M.R. described *Warburton* v. *Warburton*, 4 Bro.P.C. 1 as " a very extraordinary " case, but it is to be observed that *Kemp* v. *Kemp* was a case concerning a mere power and therefore his remarks were obiter. Reliance is placed in the statement of Lord Eldon in *Brown* v. *Higgs*, 8 Ves.Jr. 561, at pp. 570, 571 that the court will execute a power in the nature of a trust. The fact that the court will no longer make a distribution on the criterion of merit does not mean that the court will only so act if there can be an equal division. The court will direct such inquiries as it considers reasonable in the circumstances and on their conclusion distribute amongst those persons whom it discovers.

The list aspect of the doctrine propounded in *Broadway Cottages Trust* [1955] Ch. 20 arises from insufficient attention having been paid to the methods adopted by the court in executing a trust. Suppose a testator bequeaths his residuary estate to trustees on trust for J. S. The first question is to determine whether the language of the disposition is sufficiently certain. If J. S. is identified but cannot be found at the testator's death and the trustees do not know whether J. S. be alive or dead they will make application to the court which will direct an inquiry with the aim of resolving the doubt. It may be that in consequence J. S. is found or it is discovered that he predeceased the testator. In such cases no difficulty arises. But often the inquiry does not dispel the uncertainty. In the latter event there are two courses open to the judge: (i) he may decide that the fund should be placed in an account opened for the purpose in the hope that J. S. may in the future be found, or (ii) the judge may make a Benjamin order (*In re Benjamin* [1902] 1 Ch. 723) and pay out the fund on the supposition that J. S. predeceased the testator. But this latter course is not conclusive of J. S.'s rights, for if subsequently he is found he can recoup himself if he is able to trace the fund in the hands of those who received it but the trustees are protected from suit. This illustrates the fact that difficulty in finding the legatee does not invalidate the gift, and that a payment into court or the making of a Benjamin order does not finally determine rights.

The argument may be taken a stage further: suppose a testator bequeath his residuary estate to " all my grandchildren living at my death in equal shares." The trustees of the will may draw up a list of grandchildren but

have doubts concerning its completeness in which case they will apply to the court to execute the trust. The same consequences will follow as for that of the example of the sole legatee given above.

Even if the powers of a court of equity have been so diminished that in executing a trust the court is now obliged to execute it by means of an equal distribution it does not follow, and it is wrong to suggest, that the trust is invalid unless the court can make a complete list of beneficiaries. The court will administer the trust on the best available evidence.

In re Benjamin [1902] 1 Ch. 723; *In re Gess* [1942] Ch. 37 and *In re Knapp's Trust Funds (Note)* [1952] 1 All E.R. 458 are illustrative of the court's powers over the administration of trusts.

As to *In re Hain's Settlement* [1961] 1 W.L.R. 440, 444, 445, 448, it is true that a trust does not subsequently become invalid because some of the class of objects have disappeared or become impossible to find nor is its validity put in question at its inception merely because at that date it is impossible to ascertain *every* member of the class.

Judicial statements to the effect that, under discretionary dispositions which constitute a trust, the persons on whom the discretion is conferred ("the disponers") are obliged to exercise the discretion were not intended to mean that the disponers would actually be compelled to exercise the discretion, and in many cases it is unlikely that the settlor would by making the disposition ever have contemplated such actual compulsion. These statements are, however, a convenient way of stating that where the court construes a discretionary disposition as constituting a trust, it is in effect construing the disposition as containing in itself an *implied trust* for the objects of the discretion in equal shares in default of the disponers exercising the discretionary *power* expressed to be conferred on them by the disposition. If the statements be so read, the consequences may be (and this is neither illogical nor inconvenient) that a discretionary disposition which the court construes as showing an intention by the settlor to constitute a trust may as regards the implied trust in favour of the objects of the discretion be void for uncertainty (as failing to pass the tests applicable to trusts for numerous persons) and yet may as regards the discretionary power expressed to be conferred by the disposition be valid (as passing the test established by this House in *In re Gulbenkian's Settlements* [1970] A.C. 508). Such a reading of these statements would only be a small extension of the principles established in *Brown* v. *Higgs*, 8 Ves.Jr. 561, 572, that a discretionary disposition for "relatives" which constitutes a trust may enable persons to take under the disposition under the implied trust in default of the discretion being exercised. To this extent and no further it would be necessary to reconsider the decision in *Broadway Cottages Trust* [1955] Ch. 20.

In conclusion on this aspect of the appeal the respondents submit the following alternative tests for determining the validity of a discretionary trust: (i) If the class of beneficiaries of a discretionary trust is so defined that it is possible to ascertain whether any given person is a member of the class it matters not for purposes of its validity that a complete list of beneficiaries cannot be made. (ii) A discretionary trust is valid if at its inception the class of beneficiaries is ascertainable with sufficient certainty for the trust to be carried out according to the expressed intention of the settlor.

The present case would satisfy either of the above tests.

As to the construction of the deed dated July 17, 1941, the peculiar difficulty of cases like the present arises from the fact that the creator of the fund contemplated alternative methods from time to time of dealing with the income thereof. When there are alternative provisions they may be imposed in one of three different ways: (i) the settlor has conferred a power to distribute income among the beneficiaries and has directed the trustees to retain all income that they do not think fit so to distribute; (ii) the settlor has directed his trustees to distribute all income as it arises but has qualified that direction by giving them a power to retain any income if in their discretion they think fit so to do; (iii) the settlor has conferred two discretionary powers: (a) a power to distribute any income which the trustees in their discretion think fit to distribute; (b) a power to retain any income which the trustees in their discretion think fit to retain.

As regards the trustees, the practical differences between the three cases are small. But in the event of there being no trustees over a long period then the consequences in the three cases are as follows: (i) if no discretion can have been exercised, the income must have been retained to ascertain what is to be done with it; (ii) the persons to whom the income might have been distributed have the right to have it distributed among them by equal division or otherwise; (iii) if there was income at a time when neither discretion could be exercised, then that income must revert to the settlor under a resulting trust. [Reference was made to *In re Sayer* [1957] Ch. 423, 436.]

As to the question of accumulation, accumulation has become an unnecessary diversion in this case for it matters not a whit whether clause 9 (b) read with clause 9 (c) provides for accumulation in the sense of capitalisation. There are two possibilities on clause 9 as a whole: (i) the trustees must during the period whilst clause 9 is in operation distribute the whole of the income under clause 9 (a), although not necessarily yearly; (ii) at any time the trustees are only to distribute under clause 9 (a) as much of the income as they think fit. If this be the true view it necessarily follows that it is possible that at the termination of the fund when clause 9 cannot operate there will be in existence a balance of unapplied income.

On the other hand if there were an imperative obligation to disburse all income during the existence of the deed, then on the liquidation of the company the trustees must be given a short period in which to distribute the balance of income in their hands.

Clause 9 (b) should be read with reference to clause 10, and so read it should, as held by Goff J., be construed as a trust to accumulate. The words in clause 10: "No person shall have any right title or interest in the fund otherwise than pursuant to the exercise of such discretion," do not merely state the legal result which would follow if the provisions of clause 9 (a) constitute a trust, because if such provisions be a trust, then, subject to any exercise of the discretion, the objects have rights and interests enforceable by the court in respect of income not validly accumulated.

To construe the provisions of clause 9 (a) as constituting a power it is not necessary to ascribe to the settlor an intention that clause 10 was designed to achieve a resulting trust for the settlor when the power of accumulation became void under section 164 of the Law of Property Act, 1925; and further, there being nothing to suggest that the settlor had such section in mind, the

construction (as distinct from the effect) of the deed should be determined without any reference to the section.

The question whether a discretionary disposition constitutes a trust or a power is a matter which should be determined in accordance with the intention of the settlor having regard to the effect which the disposition would have according to whether it was a trust or a power: see *In re Combe* [1925] Ch. 210 and *In re Perowne, decd.* [1951] Ch. 785. These cases show that where a discretionary disposition constitutes a trust the objects of the discretion are in default of the discretion being exercised entitled equally under an implied trust. Clause 10 shows that the settlor never intended that the discretionary class mentioned in clause 9 (a) should have any such entitlement.

Further, it is unlikely, in the absence of clear indication to the contrary, that in settlements providing for grants for members of a very large class of persons (in contrast with settlements providing for an ordinary family group) the settlor intends to create a trust for the class.

Finally, in the respondents' submission no valid criticism can be directed against the Court of Appeal's approach here to the application of the doctrine of ut res magis valeat quam pereat. [Reference was also made to *Wilson* v. *Turner* (1883) 22 Ch.D. 521.]

Vinelott Q.C. replied.

Their Lordships took time for consideration.

May 6, 1970. LORD REID. My Lords, for the reasons given by my noble and learned friend Lord Wilberforce, I would allow this appeal and make the order which he suggests.

LORD HODSON. My Lords, the question under appeal is whether on its true construction the provisions of clause 9 (a) of a deed dated July 17, 1941, by which one Bertram Baden established a fund to provide benefits for the staff of Matthew Hall & Co. Ltd., and their relatives and dependants, constitutes a trust binding the trustees to distribute income in accordance with its provisions or are a mere power not imposing any such duty. Clause 9 provided:

> "(a) The trustees shall apply the net income of the fund in making at their absolute discretion grants . . . in such amounts at such times and on such conditions (if any) as they think fit . . . (b) The trustees shall not be bound to exhaust the income of any year or other period in making such grants . . . and any income not so applied shall be . . . [placed in a bank or invested]. (c) The trustees may realise any investments representing accumulations of income and apply the proceeds as though the same were income of the fund and may also . . . at any time prior to the liquidation of the fund realise any other part of the capital of the fund . . . in order to provide benefits for which the current income of the fund is insufficient."

Clause 10 provided that all benefits being at the discretion of the trustees, no person had any interest in the fund otherwise than pursuant to the exercise of that discretion.

Of the preceding clauses, clause 6 (a) provided that all moneys in the hands of the trustees and not required for the immediate service of the fund may be placed in a deposit or current account with any bank or banking house in the name of the trustees or may be invested as hereinafter provided; clause 7 dealt with the trustees' power of investment.

The settlor died in April, 1960, and his executors, the present appellants, claim that, the deed being wholly void, payment of the fund is due to the settlor's estate. This claim is resisted by those whose interest it is to establish that, whether there is a trust or a mere power under which they may benefit, in neither case is the provision which they seek to support void for uncertainty.

The importance to the parties of the particular question under appeal lies in the circumstance that as the law stands on the authorities it appears at least probable that the prospects of success for the appellants upon the question whether the deed is void for uncertainty are considerably greater if the effect of clause 9 is to constitute a trust than if, on the other hand, it only has the effect of giving to the trustees a mere power not amounting to a trust.

At first instance Goff J. held that nothing more than a power imposing no duty was contained in the provision contained in clause 9. On appeal the majority of the Court of Appeal sustained his judgment without being able to find any certainty in their conclusion, in view of the even balance, as it seemed to them, of the arguments presented. The majority felt able to sustain the judgment by relying on the doctrine ut res magis valeat quam pereat in order that the terms of the deed might have a chance of being effective since, without flying in the teeth of its provisions, the view of the trial judge might prevail, thus giving a better opportunity to those upon whom the testator wished to confer benefit.

There is no doubt that the primary trust here is expressed in a mandatory form. True that this is not necessarily conclusive: cf. *In re Hain's Settlement* [1961] 1 W.L.R. 440, 443, *per* Lord Evershed M.R., but it is a powerful foundation for the argument that a trust so created in its inception is not converted into a power by the mere addition in a later clause of a power to accumulate surplus income. Notwithstanding the different views expressed by the learned judges who have considered the matter in the courts, I cannot for myself resist the conclusion reached by Russell L.J. that clause 9 is a provision for the distribution of the whole with power to accumulate. There is a complete disposition with a primary duty to distribute, a trust for the whole period of its existence with a power to carry forward from year to year.

Clause 10 is relied upon by the respondents as showing that no member of the class was to be entitled to benefit from the fund otherwise than by the exercise of the discretion of the trustees. So it is said that there cannot be a trust of the income but only a power over it. I do not accept this. I agree with Russell L.J. that clause 10 correctly recites the effect of clause 9, viz., that all benefits are at the discretion of the trustees. The remainder of the clause states the legal result. If this makes clause 10 superfluous it does not justify, in my opinion, the conclusion that it produces a resulting trust to the settlor of income over which the trustees might not exercise their discretion in the event of accumulation being no

longer permissible. On the face of it, clause 9 (b) is no more than a provision for retention of moneys unexpended during the lifetime of the trust and as Russell L.J. pointed out it has no other function. True, that the language of clause 9 (c) using the word "accumulation" which often has a technical significance, denoting capital, followed by the permission to apply the proceeds *as though the same were income* and the succeeding reference to any other part of the capital of the fund suggest and lend support to the contrary conclusion. I am, I admit, unable to account for this language except on the footing of attributing to the draftsman a failure to give accurate expression to the intention of the settlor. I am, however, satisfied after construing this deed as a whole that the appellants are right in their first contention, viz., that clause 9 (a) constitutes a trust or power coupled with a duty under which the trustees are bound to distribute the whole estate. Clause 9 (a) and (b) together are mandatory, the latter being assisted by an administrative provision including provision for the retention and investment of unexhausted income. Clause 9 (c), notwithstanding its references to capital, is concerned only with those investments which it is to be noted can be realised only with the consent of all the trustees. This treatment is in contrast with powers given to two (or more) trustees as to the trust fund generally (see cl. 6 (b)). For these reasons I am of opinion that the order of the Court of Appeal should be reversed in so far as it affirmed that part of the order of Goff J. dated July 12, 1967, which declared that the provisions of clause 9 (a) constitute a power and not a trust. Unfortunately this does not settle the dispute between the parties.

Goff J. had in addition held that the power was valid and was not void for uncertainty, and on that footing had held that an amending deed dated December 21, 1962, was also valid. This additional holding was discharged by the Court of Appeal, which ordered remission to the Chancery Division for further hearing of the question whether upon the true construction of the deed of July 17, 1941, the provision for the benefit of officers and employees and ex-employees of the company and relatives or dependants of such persons are (a) valid or (b) void for uncertainty or for any other reason.

This latter part of the order of the Court of Appeal should stand together with a declaration that the provisions of clause 9 (a) constitute a trust, not a power.

There remains the vexed question, much canvassed before your Lordships not only in this case but in *In re Gulbenkian's Settlements* (*Whishaw* v. *Stephens*) [1970] A.C. 508, as to the distinction, if any, between trusts and bare powers in favour of a class of persons when the court has to consider whether a disposition fails by reason of uncertainty.

Of late years a number of dispositions have been considered by the courts in which donors have sought to make elaborate provisions in favour of beneficiaries including such persons as the employees of limited companies and their wives and widows. Such a case was *Inland Revenue Commissioners* v. *Broadway Cottages Trust* decided in the Court of Appeal and reported in [1955] Ch. 20. It was there recognised that the accepted test of the validity of a trust was that it must be such as the court can control. The authority for this proposition is to be found in *Morice* v.

Bishop of Durham (1805) 10 Ves.Jr. 522 as stated by Lord Eldon, where he said, at pp. 539, 540:

> "As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that it can be under that control; so that the administration of it can be reviewed by the court; or, if the trustee dies, the court itself can execute the trust: a trust therefore, which, in case of maladministration could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the court can neither reform maladministration, nor direct a due administration."

In a sentence there is no trust over which the court cannot assume control. If the inability arises from inability to ascertain the objects of the alleged trust, it is said to be void for uncertainty.

The language used on this topic may have varied from time to time but is, I think, consistent with that used in *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [1955] Ch. 20, where, in holding that the trusts of income were not such as the court could enforce, the court based itself upon the judgment of Lord Tomlin (sitting at first instance) in *In re H. J. Ogden* [1933] Ch. 678, who held that a trust for such members of a given class of objects as the trustees shall select is void for uncertainty, unless the whole range of objects eligible for selection is ascertained or capable of ascertainment.

I adhere to the view expressed in the Court of Appeal in the *Broadway Cottages Trust* case [1955] Ch. 20 that this proposition is based on sound reasoning. The *Broadway Cottages Trust* case has stood for many years. Disquiet has, however, now arisen about a strict adherence to the requirement of certainty there propounded. This disquiet is due to the narrow distinction between trust, on the one hand, where certainty is required and mere powers, on the other hand, where something less is needed. This matter was discussed before your Lordships in *In re Gulbenkian's Settlements* [1970] A.C. 508 and disquiet at the effect of the *Broadway Cottages Trust* decision is, I think, to be discerned in the speech of my noble and learned friend Lord Reid in the *Gulbenkian* case; and was clearly expressed by the two learned Lords Justices, both experienced equity lawyers, in the Court of Appeal in this case. The observations upon the distinction to which I have referred were not strictly necessary to the discussion in the *Gulbenkian* case but the matter does become of crucial importance in the instant case in view of the ratio decidendi which prevailed in the Court of Appeal.

The problem itself is not new. I may, I hope, be forgiven for referring to the leading case of *Brown* v. *Higgs*, twice heard before the Rolls Court by Sir Richard Arden and finally in your Lordships' House by Lord Eldon (see (1799) 4 Ves.Jr. 707; (1800) 5 Ves.Jr. 495; (1803) 8 Ves.Jr. 561, 576). At the rehearing (5 Ves.Jr. 495, 505) Sir Richard is reported as admitting that the distinction between trust and power was very nice. He illustrated the nicety by reference to the case of the *Duke of Marlborough* v. *Lord Godolphin* (1750) 2 Ves.Sen. 61.

The distinction between a trust and a mere power can be stated shortly

although the short statement will require some explanation. It is that where there is a trust there is a duty imposed upon the trustees who can be controlled if necessary in the exercise of their duty. Whether the trust is discretionary or not the court must be in a position to control its execution in the interests of the objects of the trust. Where there is a mere power entirely different considerations arise. The objects have no right to complain. Where by the instrument creating the power the discretion is made absolute and uncontrollable the court cannot interfere (*Gisborne* v. *Gisborne* (1877) 2 App.Cas. 300). The trust in default controls and he to whom the trust results in default of exercise of the power is in practice the only one competent to object to a wrongful exercise of the power by the donee. Counsel did not profess to know of any successful application to the court by a person claiming to be an apparent object of a bare power. I exclude from consideration cases in which bad faith may be alleged.

I do not deny that what I have said about powers is, so to speak, blurred at the edges by cases in which powers of donees who refuse to exercise their discretion have been treated by the courts as trusts. These powers have been described as intermediate between trusts and powers and are described in detail in *Farwell on Powers*, 3rd ed. (1916), p. 525, where he cites from the judgment of Lord Eldon in *Brown* v. *Higgs*, 8 Ves.Jr. 561 the following passage:

> "Where there is a mere power of disposing and it is not executed, the court cannot execute it; but wherever a trust is created and the execution of that trust fails by the death of the trustee or by accident, the court will execute the trust. But there are not only a mere trust and a mere power, but there is also known to the court a power which the party to whom it is given is intrusted and required to execute; and with regard to that species of power, the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed on him does not discharge it, the court will to a certain extent discharge the duty in his room and place. The principle is that if the power is one which it is the duty of the donee to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and has not a discretion whether he will exercise it or not. The court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it."

This passage as quoted by the learned author is to the same effect but not verbatim the same as that which appears in the report of Vesey Junior (8 Ves.Jr. 561, 570–574). It does, however, show that where powers of a fiduciary character, as opposed to being mere powers not coupled with a duty, are concerned the court's position differs in no way from that which it occupies in the case of trusts generally. Lord Eldon in the same case (8 Ves.Jr. 561, 576) said that it was difficult to reconcile all the cases.

Examples of interference by the court are to be found in such cases as

Gower v. *Mainwaring* (1750) 2 Ves.Sen. 87, which shows that the court, where a rule has been laid down for the guidance of donees of powers, will act upon it in the same way as the donees might have done. If trustees disclaim the power, the court may execute it—see *Hewett* v. *Hewett* (1765) 2 Ed. 332. In *In re Hodges* (1878) 7 Ch.D. 754 the court interfered where trustees were considered to be acting capriciously. Where duty and power are coupled the court can compel the trustees to perform the duty—see *Gisborne* v. *Gisborne*, 2 App.Cas. 300 and *Tempest* v. *Lord Camoys* (1882) 21 Ch.D. 571.

In the *Gulbenkian* case [1970] A.C. 508 the majority of your Lordships held the view that where there is a valid gift over in default of appointment a mere or bare power of appointment among classes is valid if it can be said with certainty whether any given individual is or is not a member of a class and that the power did not fail simply because of the impossibility of determining every member of the class.

In my opinion a mere power is a different animal from a trust and the test of certainty in the case of trusts which stems from *Morice* v. *Bishop of Durham*, 10 Ves.Jr. 522 is valid and should not readily yield to the test which is sufficient in the case of mere powers.

The unhappy results which may follow from incompetent drafting may be, in the case of an instrument held to impose a trust, that it is so much waste-paper, whereas in the case of an instrument differing perhaps on the face of it very little from the invalid trust instrument a good gift of a power to benefit objects may emerge. Thus it is said that in order to avoid fine distinctions the test should be the same for both.

One persuasive argument used is that, in applying the principle that where there is a trust the court must be in a position to exercise it, the court cannot exercise the trustees' discretion in the event of their failing to do so. The discretion being conferred on and exercisable by the trustees alone, the court cannot do other than authorise a distribution in equal shares. This, in cases comparable with the present, must lead to a result tending towards absurdity and makes the strict test of certainty open to serious criticism. This disability of the courts to exercise the discretion reposed in trustees was referred to in the recitation of the argument for the Crown in the judgment of the court in the *Broadway Cottages Trust* case [1955] Ch. 20, 30. It was not referred to specifically in the conclusion reached by the court although it would be fair to say that the arguments of the Crown set out in the judgment were implicitly accepted. For myself I do not deny that there is force in the argument based on the absurdity of an equal division especially as it has not always been accepted.

In what are called the relations cases, *Mosely* v. *Moseley* (1673) Fin. 53, *Clarke* v. *Turner* (1694) Free.Ch. 198 and *Warburton* v. *Warburton* (1702) 4 Bro.P.C. 1, the court did exercise its own discretionary judgment against equal division. Similarly, in a different context the same principle was applied in the case of *Richardson* v. *Chapman* (1760) 7 Bro.P.C. 318, where it appears from the reported argument that the court decreed the proper act to be done not by referring the matter to the trustee's discretion but by directing him to perform as a mere instrument the thing decreed (pp. 326–327). These cases may be explained as cases where there were

indications which acted as pointers or guides to the trustees and enabled the court to substitute its own discretion for that of the trustees.

This practice, however, has fallen into desuetude and the modern, less flexible, practice has, it appears, been followed since 1801, when Sir Richard Arden M.R. in *Kemp* v. *Kemp* (1801) 5 Ves.Jr. 849 stated that the court now disclaims the right to execute a power and gives the fund equally. The basis of this change of policy appears to be that the court has not the same freedom of action as a trustee and must act judicially according to some principle or rule and not make a selection giving no reason as the trustees can. The court, it is said, is driven in the end to the principle that equity is equality unless, as in the relations cases, the court finds something to aid it. Where there is no guide given the court, it is said, has no right to substitute its own discretion for that of the designated trustees.

I regret that the court is driven to adopt a non possumus attitude in cases where trustees fail to exercise a trust power. In this connection it is perhaps not irrelevant to note that the court has not shown itself helpless in cases of failure and uncertainty where an order has been made to distribute part and pay the balance into court (see *In re Benjamin* [1902] 1 Ch. 723). Difficulties of fact in these cases must often arise especially after the passage of time when it is not known what has happened to members of a class who have gone abroad or disappeared and should be capable of solution. Certainty of description, however, if required, must be required at the moment when a trust instrument operates.

I have had the advantage of reading the speech which has been prepared by my noble and learned friend Lord Wilberforce, whose opinion particularly on this topic is of very strong persuasive power. I cannot, however, bridge the gulf which still, I think, yawns between us. If one bases oneself, as I do, on the passage from Lord Eldon's judgment in *Morice* v. *Bishop of Durham*, 10 Ves.Jr. 522, 540 as defining the features of a trust, it is, in my opinion, impermissible to sanction, in the case of an uncertain disposition in the sense of the passage quoted, the authorisation by the court of a scheme of distribution such as he suggests. I cannot accept that this is justified by stating that a wider range of inquiry is called for in the case of trust powers than in the case of powers (meaning " mere " as opposed to " trust powers "). To adopt this solution is, I think, to do the very thing which the court cannot do. As was pointed out by my noble and learned friend Lord Upjohn in the *Gulbenkian* case [1970] A.C. 508, 524:

> " The trustees have a duty to select the donees of the donor's bounty from among the class designated by the donor; he has not entrusted them with any power to select the donees merely from among claimants who are within the class, for that is constituting a narrower class and the donor has given them no power to do this."

I have read and re-read the speech of my noble and learned friend Lord Wilberforce with, I hope, a readiness to change my mind and to temper logic with convenience, but having given the best consideration I can to the problem, I still adhere to the view I have previously expressed in the *Broadway Cottages* case [1955] Ch. 20 and in the *Gulbenkian* case [1970] A.C. 508 as to the requirements for certainty in the case of the objects of a trust.

I agree with Russell L.J. that the appeal should be allowed and would declare that the provision of clause 9 (a) constitutes a trust, and remit the case to the Chancery Division for determination whether clause 9 is (subject to the effects of section 164 of the Law of Property Act, 1925) valid or void for uncertainty.

LORD GUEST. My Lords, I have had the advantage of reading the speech of my noble and learned friend Lord Hodson. I agree with it. I only make a few observations of my own.

Upon the question of construction I have no doubt, in agreement with Russell L.J. in the Court of Appeal, that this is a trust and must be so construed. Clause 9 (a) is mandatory and provides that the trustees *shall* apply the net income of the fund in making at their absolute discretion grants to or for the benefit of certain persons. By clause 9 (b) they are not bound to exhaust the income of any one year or period in making such grants. Any income not so applied is to be dealt with according to clause 6 (c), which provides that moneys in the hands of the trustees not required for the immediate service of the fund are to be placed on deposit or current account or invested. There is a distinction made between the fund as defined by clause 1 and consisting of the capital of the fund and the income which according to clause 9 (a) is to be distributed among the beneficiaries. It was argued for the respondents that the terms of the deed imported an accumulation of income with power to distribute. I prefer the appellants' description as a direction to distribute income with a power to withhold income.

There is, in my view, a complete answer to the argument that clause 9 (c) contains a mere power and not a trust in that if it was a power the trustees would not be bound to distribute one penny of the income. This is quite contrary to the plain intentions of the settlor that all the income of the fund should be distributed with a power to withhold.

If I understand English law correctly there is a basic distinction between a deed containing a power and a deed containing a trust. The distinction may be difficult to draw, but once drawn the effect is different. In the former case there is a resulting trust in favour of the settlor upon failure to exercise the power or in the case of an invalid exercise. In the case of a trust the beneficiaries are the objects of the trustee's bounty. The trustees are acting in a fiduciary capacity. If the trustees fail to exercise their discretion, the court can compel them to exercise the trust. This distinction has been recognised in the authorities over the years (see *Gisborne* v. *Gisborne*, 2 App.Cas. 300) and finally confirmed by a majority of your Lordships in *In re Gulbenkian's Settlements* [1970] A.C. 508. In that case the deed admittedly contained a power and the test accordingly was whether in the case of any individual the trustees could safely say that he did or did not come within the category of objects of the power and it was held that the deed was valid (see Lord Upjohn at p. 523). But my noble and learned friend Lord Upjohn, having dealt with the question of a mere power, proceeded to make some general observations upon the question where there was a trust and not a power. The distinction between a power and a trust was clearly recognised in those observations, albeit obiter, by Lord Upjohn. My noble and learned friend Lord Hodson and

I concurred in his opinion. But I do not detect in the opinions of the other noble Lords in that case any disagreement with the distinction.

Upon the assumption that this is a deed containing a trust power and not a mere power—as I understand all your Lordships agree—the question then arises what test is to be applied in order to determine the validity of the trust. Up till the present day the test in each case has been different. In the case of a power it is only necessary for the trustees to know whether a particular individual does or does not come within the ambit of the power (*In re Gulbenkian's Settlements*). In the case of a trust power it is necessary for the validity of the trust that the class among whom the trustees are to exercise their discretion must be ascertainable. This is the result of the decisions in *In re H. J. Ogden* [1933] Ch. 678 (a decision of Lord Tomlin) and latterly in *Broadway Cottages Trust* [1955] Ch. 20 as confirmed in the opinions of the majority of your Lordships in *Gulbenkian's* case [1970] A.C. 508.

It is now suggested for the first time that so far as the test of validity is concerned a mere power and a trust power can be assimilated. It is worth observing at the outset that this is a change of direction from the opinion expressed by the majority as recently as 1968. This is justified not upon the ground that the arguments in the previous case were not fully canvassed nor upon the ground that the previous decision was plainly wrong, but upon the basis of expediency.

I will now attempt to analyse the basis of the view of those who consider that there should be an assimilation of the tests for validity. As I have already said, the distinction between a mere power and a trust power is fundamental. The court, apart from a mala fide exercise of a mere power, has no control over the exercise of the power by the donee or trustees, as the case may be. If it is not exercised or fails for invalidity the fund goes to those entitled in default, under the settlement or on a resulting trust. It is very different in the case of a trust power. There the trustees are under a fiduciary duty to exercise the power. The beneficiaries can compel the trustees to exercise the power by application to the court if necessary. If the beneficiaries agreed among themselves to equal divisions they could compel the trustees to distribute the whole fund: see Harman L.J. in *In re Gestetner Settlement* [1953] Ch. 672, 686. One of the reasons which, it is said, requires complete ascertainment of the class of objects is that if the court has to administer the trust, then, as it is only the trustees who have discretionary powers, the court can only make an equal division. "*Equity is equality.*" This basic conception is challenged by reference to what is known as the "relation" cases. It is said that the court in these cases has, instead of making an equal division, made a selection in the exercise of its discretion. This shows, it is said, that the principle of equal division is not a necessary result of the exercise of a trust power by the court. I regard the "relation" cases as special for this reason, that in all of them some guide or pointer was given to the trustees as to the manner in which that discretion was to be exercised. The settlor entrusted a discretion to his trustee with certain guide lines and in these circumstances the court did not find it difficult to exercise its own discretion in accordance with the supposed intention of the settlor. For example, in *Clarke* v. *Turner*, Free.Ch. 198 the devise was to "such of the relations

of the testator as he should think best, and most reputable for his family." The court chose the heir-at-law as the most reputable. In *Warburton* v. *Warburton* (1702) 4 Bro.P.C. 1, "a very extraordinary" case as described by the Master of the Rolls (Sir Richard Arden) in *Kemp* v. *Kemp*, 5 Ves. Jr. 849, 859, the discretion was among the executors, their brothers and sister according to their needs. The court gave a double share to the heir. *Richardson* v. *Chapman*, 7 Bro.P.C. 318 was not a "relation" case but depended on its own very special facts. Granted that the court did not in these cases direct an equal division, it by no means follows that in a non-relation case where the trustees are given the discretion to distribute amongst a wide class of objects with no guide lines the court would exercise a power of selection. The court has no discretion and is given no guide lines upon which to exercise a discretion. It is on the trustees that the settlor has conferred the discretion. The court can in these circumstances only order an equal division. I consider that the reliance on the "relation" cases is based upon an insecure foundation. Moreover, in none of those cases was it ever suggested that the class of objects was not ascertainable. The test of validity never therefore arose.

A more fundamental objection, however, to the reliance on these cases as a basis for a change in the law is not only their great antiquity—all in the eighteenth century—but also that they were all decided before *Kemp* v. *Kemp* (1801) 5 Ves.Jr. 849 and *Morice* v. *Bishop of Durham*, 10 Ves.Jr. 522, where the principle of equality was firmly established and has, so far as my researches go, never been questioned since. In *Kemp* v. *Kemp* the relation cases were cited but were not thought of sufficient importance to alter the practice. I do not re-quote the passage from Lord Eldon's judgment in *Morice* v. *Bishop of Durham*, 10 Ves.Jr. 522, 539, 540 referred to in the speech of my noble and learned friend Lord Hodson.

It would be presumptuous on my part to attempt to improve upon the language of my noble and learned friend Lord Upjohn in *Gulbenkian* [1970] A.C. 508. I agree with the conclusions he expresses in that part of his speech which has been correctly described as obiter dictum. It seems to be as plain as can be that if all the objects are not ascertainable, then to distribute amongst the known objects is to take a narrower class than the settlor has directed and so to conflict with his intention.

It has been suggested that it is not in conformity with the court's duty to administer a trust that the settlor's intentions are to be defeated by this "narrow distinction" between mere power and trust power. As I have already said, I regard the distinction as basic. It is also suggested that it is in the public interest that trusts of the nature of the present should be saved, if possible, because of the great benefit conferred on the beneficiaries. I agree, but if this is desirable the remedy is by legislation and not by judicial reform.

For these reasons, I adhere to my concurrence with the whole of the opinion of my noble and learned friend Lord Upjohn in *Gulbenkian*.

I would allow the appeal.

VISCOUNT DILHORNE. My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Wilberforce. I agree with it. For the reasons he gives, in my opinion the provisions of clause 9

(a) of the deed constitute a trust, and I entirely agree with his observations as to the tests to be applied to determine the validity of a trust.

I, too, would allow the appeal and make the orders he proposes.

LORD WILBERFORCE. My Lords, this appeal is concerned with the validity of a trust deed dated July 17, 1941, by which Mr. Bertram Baden established a fund for the benefit, broadly, of the staff of the respondent company, Matthew Hall & Co. Ltd. Mr. Baden died in 1960 and the appellants are the executors of his will. They claim that the trust deed is invalid and that the assets transferred to the trustees by their testator revert to his estate. The trusts established by the deed are of a general type which has recently become common, the beneficiaries including a wide class of persons among whom the trustees are given discretionary powers or duties of distribution. It is the width of the class which in this and in other cases before the courts has given rise to difficulty and to the contention that the trusts are too indefinite to be upheld.

The trust deed begins with a recital that the settlor desired to establish a fund for providing benefits for the staff of the company and their relatives or dependants. The critical clauses are as follows:

> " 9. (a) The trustees shall apply the net income of the fund in making at their absolute discretion grants to or for the benefit of any of the officers and employees or ex-officers or ex-employees of the company or to any relatives or dependants of any such persons in such amounts at such times and on such conditions (if any) as they think fit and any such grant may at their discretion be made by payment to the beneficiary or to any institution or person to be applied for his or her benefit and in the latter case the trustees shall be under no obligation to see to the application of the money. (b) The trustees shall not be bound to exhaust the income of any year or other period in making such grants as aforesaid and any income not so applied shall be dealt with as provided by clause 6 (a) hereof. [Clause 6. (a) All moneys in the hands of the trustees and not required for the immediate service of the fund may be placed in a deposit or current account with any bank or banking house in the name of the trustees or may be invested as hereinafter provided.] (c) The trustees may realise any investments representing accumulations of income and apply the proceeds as though the same were income of the fund and may also (but only with the consent of all the trustees) at any time prior to the liquidation of the fund realise any other part of the capital of the fund which in the opinion of the trustees it is desirable to realise in order to provide benefits for which the current income of the fund is insufficient.
>
> " 10. All benefits being at the absolute discretion of the trustees, no person shall have any right title or interest in the fund otherwise than pursuant to the exercise of such discretion, and nothing herein contained shall prejudice the right of the company to determine the employment of any officer or employee."

Clause 11 defines a perpetuity period within which the trusts are, in any event, to come to an end and clause 12 provides for the termination of the fund. On this event the trustees are directed to apply the fund in their

discretion in one or more of certain specified ways of which one is in making grants as if they were grants under clause 9 (a). There are certain other provisions in the deed upon which arguments have been based, but these are of a subsidiary character and citation of them is unnecessary. A

The present proceedings were started in 1963 by an originating summons taken out in the Chancery Division by the trustees of the deed seeking the decision of the court upon various questions, including that of the validity or otherwise of the trusts of the deed. It came before Goff J. in 1967. He first decided that the references in clauses 9 and 12 to employees of the company were not limited to the "staff" but comprised all the officers and employees of the company. There was no appeal against this. B

On the main question of validity, the learned judge was, it seems, invited first to decide whether the provisions of clause 9 (a) constitute a trust or a power. This was on the basis that certain decided cases (which I shall examine) established a different test of invalidity for trusts on the one hand and powers on the other. He decided in favour of a power, and further that on this footing clause 9 (a) was valid. On appeal, the Court of Appeal by a majority upheld the decision in favour of a power, but held also that the learned judge had applied the wrong test for the validity of powers, the correct test being that stated (subsequent to the hearing before Goff J.) by this House in *In re Gulbenkian's Settlement* (*Whishaw* v. *Stephens*) [1970] A.C. 508. The Court of Appeal therefore remitted the case to the Chancery Division to reconsider the validity of clause 9 (a) as a power. C D

In this House, the appellants contend, and this is the first question for consideration, that the provisions of clause 9 (a) constitute a trust and not a power. If that is held to be the correct result, both sides agree that the case must return to the Chancery Division for consideration, on this footing, whether this trust is valid. But here comes a complication. In the present state of authority, the decision as to validity would turn on the question whether a complete list (or on another view a list complete for practical purposes) can be drawn up of all possible beneficiaries. This follows from the Court of Appeal's decision in *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [1955] Ch. 20 as applied in later cases by which, unless this House decides otherwise, the Court of Chancery would be bound. The respondents invite your Lordships to review this decision and challenge its correctness. So the second issue which arises, if clause 9 (a) amounts to a trust, is whether the existing test for its validity is right in law and, if not, what the test ought to be. E F

Before dealing with these two questions some general observations, or reflections, may be permissible. It is striking how narrow and in a sense artificial is the distinction, in cases such as the present, between trusts or as the particular type of trust is called, trust powers, and powers. It is only necessary to read the learned judgments in the Court of Appeal to see that what to one mind may appear as a power of distribution coupled with a trust to dispose of the undistributed surplus, by accumulation or otherwise, may to another appear as a trust for distribution coupled with a power to withhold a portion and accumulate or otherwise dispose of it. A layman and, I suspect, also a logician would find it hard to understand what difference there is. G H

It does not seem satisfactory that the entire validity of a disposition should depend on such delicate shading. And if one considers how in practice reasonable and competent trustees would act, and ought to act, in the two cases, surely a matter very relevant to the question of validity, the distinction appears even less significant. To say that there is no obligation to exercise a mere power and that no court will intervene to compel it, whereas a trust is mandatory and its execution may be compelled, may be legally correct enough but the proposition does not contain an exhaustive comparison of the duties of persons who are trustees in the two cases. A trustee of an employees' benefit fund, whether given a power or a trust power, is still a trustee and he would surely consider in either case that he has a fiduciary duty: he is most likely to have been selected as a suitable person to administer it from his knowledge and experience, and would consider he has a responsibility to do so according to its purpose. It would be a complete misdescription of his position to say that, if what he has is a power unaccompanied by an imperative trust to distribute, he cannot be controlled by the court unless he exercised it capriciously, or outside the field permitted by the trust (cf. *Farwell on Powers*, 3rd ed., p. 524). Any trustee would surely make it his duty to know what is the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to other possible claimants, a particular grant was appropriate.

Correspondingly a trustee with a duty to distribute, particularly among a potentially very large class, would surely never require the preparation of a complete list of names, which anyhow would tell him little that he needs to know. He would examine the field, by class and category; might indeed make diligent and careful inquiries, depending on how much money he had to give away and the means at his disposal, as to the composition and needs of particular categories and of individuals within them; decide upon certain priorities or proportions, and then select individuals according to their needs or qualifications. If he acts in this manner, can it really be said that he is not carrying out the trust?

Differences there certainly are between trust (trust powers) and powers, but as regards validity, should they be so great as that in one case complete, or practically complete, ascertainment is needed, but not in the other? Such distinction as there is would seem to lie in the extent of the survey which the trustee is required to carry out: if he has to distribute the whole of a fund's income, he must necessarily make a wider and more systematic survey than if his duty is expressed in terms of a power to make grants. But just as, in the case of a power, it is possible to underestimate the fiduciary obligation of the trustee to whom it is given, so, in the case of a trust (trust power), the danger lies in overstating what the trustee requires to know or to inquire into before he can properly execute his trust. The difference may be one of degree rather than of principle: in the well-known words of Sir George Farwell, *Farwell on Powers*, 3rd ed. (1916), p. 10, trusts and powers are often blended, and the mixture may vary in its ingredients.

With this background I now consider whether the provisions of clause 9 (a) constitute a trust or a power. I do so briefly because this is not a matter on which I or, I understand, any of your Lordships have any

doubt. Indeed, a reading of the judgments of Goff J. and of the majority in the Court of Appeal leave the strong impression that, if it had not been for their leaning in favour of possible validity and the state of the authorities, these learned judges would have found in favour of a trust. Naturally read, the intention of the deed seems to me clear: clause 9 (a), whose language is mandatory ("shall"), creates, together with a power of selection, a trust for distribution of the income, the strictness of which is qualified by clause 9 (b), which allows the income of any one year to be held up and (under clause 6 (a)) either placed, for the time, with a bank, or, if thought fit, invested. Whether there is, in any technical sense, an accumulation seems to me in the present context a jejune inquiry: what is relevant is that clause 9 (c) marks the difference between "accumulations" of income and the capital of the fund: the former can be distributed by a majority of the trustees, the latter cannot. As to clause 10, I do not find in it any decisive indication. If anything, it seems to point in favour of a trust, but both this and other points of detail are insignificant in the face of the clearly expressed scheme of clause 9. I therefore agree with Russell L.J. and would to that extent allow the appeal, declare that the provisions of clause 9 (a) constitute a trust and remit the case to the Chancery Division for determination whether on this basis clause 9 is (subject to the effects of section 164 of the Law of Property Act, 1925) valid or void for uncertainty.

This makes it necessary to consider whether, in so doing, the court should proceed on the basis that the relevant test is that laid down in *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [1955] Ch. 20 or some other test.

That decision gave the authority of the Court of Appeal to the distinction between cases where trustees are given a *power* of selection and those where they are bound by a *trust* for selection. In the former case the position, as decided by this House, is that the power is valid if it can be said with certainty whether any given individual is or is not a member of the class and does not fail simply because it is impossible to ascertain every member of the class (*In re Gulbenkian's Settlements* [1970] A.C. 508). But in the latter case it is said to be necessary, for the trust to be valid, that the whole range of objects (I use the language of the Court of Appeal) should be ascertained or capable of ascertainment.

The respondents invited your Lordships to assimilate the validity test for trusts to that which applies to powers. Alternatively they contended that in any event the test laid down in the *Broadway Cottages* case [1955] Ch. 20 was too rigid, and that a trust should be upheld if there is sufficient practical certainty in its definition for it to be carried out, if necessary with the administrative assistance of the court, according to the expressed intention of the settlor. I would agree with this, but this does not dispense from examination of the wider argument. The basis for the *Broadway Cottages* principle is stated to be that a trust cannot be valid unless, if need be, it can be executed by the court, and (though it is not quite clear from the judgment where argument ends and decision begins) that the court can only execute it by ordering an equal distribution in which every beneficiary shares. So it is necessary to examine the authority and reason for this supposed rule as to the execution of trusts by the court.

Assuming, as I am prepared to do for present purposes, that the test of validity is whether the trust can be executed by the court, it does not follow that execution is impossible unless there can be equal division.

As a matter of reason, to hold that a principle of equal division applies to trusts such as the present is certainly paradoxical. Equal division is surely the last thing the settlor ever intended: equal division among all may, probably would, produce a result beneficial to none. Why suppose that the court would lend itself to a whimsical execution? And as regards authority, I do not find that the nature of the trust, and of the court's powers over trusts, calls for any such rigid rule. Equal division may be sensible and has been decreed, in cases of family trusts, for a limited class; here there is life in the maxim "equality is equity," but the cases provide numerous examples where this has not been so, and a different type of execution has been ordered, appropriate to the circumstances.

Mosely v. *Moseley*, Fin. 53 is an early example, from the time of equity's architect, where the court assumed power (if the executors did not act) to nominate from the sons of a named person as it should think fit and most worthy and hopeful, the testator's intention being that the estate should not be divided. In *Clarke* v. *Turner*, Free.Ch. 198, on a discretionary trust for relations, the court decreed conveyance to the heir-at-law judging it "most reputable for the family that the heir-at-law should have it." In *Warburton* v. *Warburton*, 4 Bro.P.C. 1, on a discretionary trust to distribute between a number of the testator's children, the House of Lords affirmed a decree of Lord Keeper Wright that the eldest son and heir, regarded as necessitous, should have a double share, the court exercising its own discretionary judgment against equal division.

These are examples of family trusts but in *Richardson* v. *Chapman*, 7 Bro.P.C. 318 the same principle is shown working in a different field. There was a discretionary trust of the testator's "options" (namely, rights of presentation to benefices or dignities in the Church) between a number of named or specified persons, including present and former chaplains and other domestics; also "my worthy friends and acquaintance, particularly the Reverend Dr. Richardson of Cambridge." The House of Lords (reversing Lord Keeper Henley) set aside a "corrupt" presentation and ordered the trustees to present Dr. Richardson as the most suitable person. The grounds of decision in this House, in accordance with the prevailing practice, were not reported, but it may be supposed that the reported argument was accepted that where the court sets aside the act of the trustee, it can at the same time decree the proper act to be done, not by referring the matter to the trustee's discretion, but by directing him to perform as a mere instrument the thing decreed (ibid., 326, 327). This shows that the court can in a suitable case execute a discretionary trust according to the perceived intention of the truster. It is interesting also to see that it does not seem to have been contended that the trust was void because of the uncertainty of the words "my worthy friends and acquaintance." There was no doubt that Dr. Richardson came within the designation.

In the time of Lord Eldon, the Court of Chancery adopted a less flexible practice: in *Kemp* v. *Kemp*, 5 Ves.Jr. 849 Sir Richard Arden M.R., commenting on *Warburton* v. *Warburton*, 4 Bro.P.C. 1 ("a very extra-

ordinary" case), said that the court now disclaims the right to execute a power (i.e., a trust power) and gives the fund equally. But I do not think that this change of attitude, or practice, affects the principle that a discretionary trust *can*, in a suitable case, be executed according to its merits and otherwise than by equal division. I prefer not to suppose that the great masters of equity, if faced with the modern trust for employees, would have failed to adapt their creation to its practical and commercial character. Lord Eldon himself, in *Morice* v. *Bishop of Durham*, 10 Ves.Jr. 522, laid down clearly enough that a trust fails if the object is insufficiently described or if it cannot be carried out, but these principles may be fully applied to trust powers without requiring a complete ascertainment of all possible objects. His earlier judgment in the leading, and much litigated, case of *Brown* v. *Higgs*, 8 Ves.Jr. 561 shows that he was far from fastening any rigid test of validity upon trust powers. After stating the distinction, which has ever since been followed, between powers, which the court will not require the donee to execute, and powers in the nature of a trust, or trust powers, he says of the latter that if the trustee does not discharge it, the court will, *to a certain extent*, discharge the duty in his room and place. To support this, he cites *Harding* v. *Glyn* (1739) 1 Atk. 469, an early case where the court executed a discretionary trust for "relations" by distributing to the next-of-kin.

I dwell for a moment upon this point because, not only was *Harding* v. *Glyn* described by Lord Eldon (8 Ves.Jr. 561, 570) as having been treated as a clear authority in his experience for a long period, but the principle of it was adopted in several nineteenth-century authorities. When the *Broadway Cottages Trust* case came to be decided in 1955, these cases were put aside as anomalous (see [1955] Ch. at pp. 33, 35), but I think they illustrate the flexible manner in which the court, if called on, executes trust powers for a class. At least they seem to prove that the supposed rule as to equal division does not rest on any principle inherent in the nature of a trust. They prompt me to ask why a practice, or rule, which has been long followed and found useful in "relations" cases should not also serve in regard to "employees," or "employees and their relatives," and whether a decision which says the contrary is acceptable.

I now consider the modern English authorities, particularly those relied on to show that complete ascertainment of the class must be possible before it can be said that a discretionary trust is valid.

In re H. J. Ogden [1933] Ch. 678 is not a case which I find of great assistance. The argument seems to have turned mainly on the question whether the trust was a purpose trust or a trust for ascertained objects. The latter was held to be the case and the court then held that all the objects of the discretionary gift could be ascertained. It is weak authority for the requirement of complete ascertainment.

The modern shape of the rule derives from *In re Gestetner Settlement* [1953] Ch. 672, where the judgment of Harman J., to his later regret, established the distinction between discretionary powers and discretionary trusts. The focus of this case was upon powers. The judgment first establishes a distinction between, on the one hand, a power collateral, or appurtenant, or other powers "which do not impose a trust on the conscience of the donee" (at p. 684), and on the other hand a trust imposing

a duty to distribute. As to the first, the learned judge said (ibid.): "I do not think it can be the law that it is necessary to know of all the objects in order to appoint to one of them." As to the latter he uses these words (at p. 685): "It seems to me there is much to be said for the view that he must be able to review the whole field in order to exercise his judgment properly." He then considers authority on the validity of powers, the main stumbling-block in the way of his own view being some words used by Fry J. in *Blight* v. *Hartnoll* (1881) 19 Ch.D. 294, 301, which had been adversely commented on in *Farwell on Powers* (3rd ed., at pp. 168, 169), and I think it worth while quoting the words of his conclusion. He says ([1953] Ch. 672, 688, 689):

> "The settlor had good reason, I have no doubt, to trust the persons whom he appointed trustees; but I cannot see here that there is such a duty as makes it essential for these trustees, before parting with any income or capital, to survey the whole field, and to consider whether A is more deserving of bounty than B. That is a task which was and which must have been known to the settlor to be impossible, having regard to the ramifications of the persons who might become members of this class.
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> "If, therefore, there be no duty to distribute, but only a duty to consider, it does not seem to me that there is any authority binding on me to say that this whole trust is bad. In fact, there is no difficulty, as has been admitted, in ascertaining whether any given postulant is a member of the specified class. Of course, if that could not be ascertained the matter would be quite different, but of John Doe or Richard Roe it can be postulated easily enough whether he is or is not eligible to receive the settlor's bounty. There being no uncertainty in that sense, I am reluctant to introduce a notion of uncertainty in the other sense, by saying that the trustees must worry their heads to survey the world from China to Peru, when there are perfectly good objects of the class in England."

Subject to one point which was cleared up in this House in *In re Gulbenkian's Settlements* [1970] A.C. 508, all of this, if I may say so, seems impeccably good sense, and I do not understand the learned judge to have later repented of it. If the judgment was in any way the cause of future difficulties, it was in the indication given—not by way of decision, for the point did not arise—that there was a distinction between the kind of certainty required for powers and that required for trusts. There is a difference perhaps but the difference is a narrow one, and if one is looking to reality one could hardly find better words than those I have just quoted to describe what trustees, in either case, ought to know. A second look at this case, while fully justifying the decision, suggests to me that it does not discourage the application of a similar test for the validity of trusts.

So I come to *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [1955] Ch. 20. This was certainly a case of trust, and it proceeded on the basis of an admission, in the words of the judgment, "that the class of 'beneficiaries' is incapable of ascertainment." In addition to the discretionary trust of income, there was a trust of capital for all the beneficiaries living or existing at the terminal date. This necessarily

involved equal division and it seems to have been accepted that it was void for uncertainty since there cannot be equal division among a class unless all the members of the class are known. The Court of Appeal applied this proposition to the discretionary trust of income, on the basis that execution by the court was only possible on the same basis of equal division. They rejected the argument that the trust could be executed by changing the trusteeship, and found the relations cases of no assistance as being in a class by themselves. The court could not create an arbitrarily restricted trust to take effect in default of distribution by the trustees. Finally they rejected the submission that the trust could take effect as a power: a valid power could not be spelt out of an invalid trust.

My Lords, it will have become apparent that there is much in this which I find out of line with principle and authority but before I come to a conclusion on it, I must examine the decision of this House in *In re Gulbenkian's Settlements* [1970] A.C. 508 on which the appellants placed much reliance as amounting to an endorsement of the *Broadway Cottages* case [1955] Ch. 20. But is this really so? That case was concerned with a power of appointment coupled with a gift over in default of appointment. The possible objects of the power were numerous and were defined in such wide terms that it could certainly be said that the class was unascertainable. The decision of this House was that the power was valid if it could be said with certainty whether any given individual was or was not a member of the class, and did not fail simply because it was impossible to ascertain every member of the class. In so deciding, their Lordships rejected an alternative submission, to which countenance had been given in the Court of Appeal, that it was enough that one person should certainly be within the class. So, as a matter of decision, the question now before us did not arise or nearly arise. However, the opinions given were relied on, and strongly, as amounting to an endorsement of the "complete ascertainment" test as laid down in the *Broadway Cottages* case.

My Lords, I comment on this submission with diffidence, because three of those who were party to the decision are present here today, and will express their own views. But with their assistance, and with respect for their views, I must endeavour to appraise the appellants' argument. My noble and learned friend Lord Reid's opinion can hardly be read as an endorsement of the *Broadway Cottages* case. It is really the opinion of my noble and learned friend Lord Upjohn which has to be considered. Undoubtedly the main part of that opinion, as one would expect, was concerned to deal with the clause in question, which required careful construction, and with the law as to powers of appointment among a numerous and widely defined class. But having dealt with these matters the opinion continues with some general observations. I have considered these with great care and interest: I have also had the advantage of considering a detailed report of the argument of counsel on both sides who were eminent in this field. I do not find that it was contended on either side that the *Broadway Cottages Trust* case was open to criticism—neither had any need to do so. The only direct reliance upon it appears to have been to the extent of the fifth proposition appearing on p. 31 of the report, which was relevant as referring to powers, but does not touch this case. It is consequently not surprising that my noble and learned friend Lord

Upjohn nowhere expresses his approval of this decision and indeed only cites it, in the earlier portion, in so far as it supports a proposition as to powers. Whatever dicta therefore the opinion was found to contain, I could not, in a case where a direct and fully argued attack has been made on the *Broadway Cottages* case, regard them as an endorsement of it and I am sure that my noble and learned friend, had he been present here, would have regarded the case as at any rate open to review. In fact I doubt very much whether anything his Lordship said was really directed to the present problem. I read his remarks as dealing with the suggestion that trust powers ought to be entirely assimilated to conditions precedent and powers collateral. The key passage is where he says [1970] A.C. 508, 525:

> " Again the basic difference between a mere power and a trust power is that in the first case trustees owe no duty to exercise it and the relevant fund or income falls to be dealt with in accordance with the trusts in default of its exercise, whereas in the second case the trustees *must* exercise the power and in default the court will. It is briefly summarised in *Halsbury's Laws of England*, 3rd ed., Vol. 30 (1959), p. 241, para. 445:
>
> " '. . . the court will not exercise or compel trustees to exercise a purely discretionary power given to them; but the court will restrain the trustees from exercising the power improperly, and, if it is coupled with a duty, the court can compel the trustees to perform their duty.'
>
> " It is a matter of construction whether the power is a mere power or a trust power and the use of inappropriate language is not decisive (*Wilson* v. *Turner* (1883) 22 Ch.D. 521, 525).
>
> " So, with all respect to the contrary view, I cannot myself see how, consistently with principle, it is possible to apply to the execution of a trust power the principles applicable to the permissible exercise by the donees (even if trustees) of mere powers; that would defeat the intention of donors completely.
>
> " But with respect to mere powers, while the court cannot compel the trustees to exercise their powers, yet those entitled to the fund in default must clearly be entitled to restrain the trustees from exercising it save among those within the power. So the trustees or the court must be able to say with certainty who is within and who is without the power. It is for this reason that I find myself unable to accept the broader proposition advanced by Lord Denning M.R. and Winn L.J., mentioned earlier, and agree with the proposition as enunciated in *In re Gestetner Settlement* [1953] Ch. 672 and the later cases."

The reference to " defeating the intention of donors completely " shows that what he is concerned with is to point to the contrast between powers and trusts which lies in the facultative nature of the one and the mandatory nature of the other, the conclusion being the rejection of the " broader " proposition as to powers accepted by two members of the Court of Appeal. With this in mind it becomes clear that the sentence so much relied on by the appellants will not sustain the weight they put on it. This is:

> " The trustees have a duty to select the donees of the donor's bounty from among the class designated by the donor; he has not entrusted

> them with any power to select the donees merely from among known claimants who are within the class, for that is constituting a narrower class and the donor has given them no power to do this" ([1970] A.C. 508, 524).

What this does say, and I respectfully agree, is that, in the case of a trust, the trustees must select from the class. What it does not say, as I read it, or imply, is that in order to carry out their duty of selection they must have before them, or be able to get, a complete list of all possible objects.

So I think that we are free to review the *Broadway Cottages* case [1955] Ch. 20. The conclusion which I would reach, implicit in the previous discussion, is that the wide distinction between the validity test for powers and that for trust powers is unfortunate and wrong, that the rule recently fastened upon the courts by *Inland Revenue Commissioners* v. *Broadway Cottages Trust* ought to be discarded, and that the test for the validity of trust powers ought to be similar to that accepted by this House in *In re Gulbenkian's Settlements* [1970] A.C. 508 for powers, namely, that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class.

I am interested, and encouraged, to find that the conclusion I had reached by the end of the argument is supported by distinguished American authority. Professor Scott in his well-known book on trusts (*Scott on Trusts* (1939)) discusses the suggested distinction as regards validity between trusts and powers and expresses the opinion that this would be "highly technical" (s. 122, p. 613). Later in the second *Restatement of Trusts* (1959), s. 122 (which *Restatement* aims at stating the better modern view and which annotates the *Broadway Cottages* case), a common test of invalidity is taken, whether trustees are "authorised" or "directed": this is that the class must not be so indefinite that it cannot be ascertained whether any person falls within it. The reporter is Professor Austin Scott. In his abridgment, published in 1960 (*Scott's Abridgment of The Law of Trusts*, s. 122, p. 239), Professor Scott maintains the same position:

> "It would seem that if a power of appointment among the members of an indefinite class is valid, the mere fact that the testator intended not merely to confer a power but to impose a duty to make such an appointment should not preclude the making of such an appointment. It would seem to be the height of technicality that if a testator *authorises* a legatee to divide the property among such of the testator's friends as he might select, he can properly do so, but that if he *directs* him to make such a selection, he will not be permitted to do so."

Assimilation of the validity test does not involve the complete assimilation of trust powers with powers. As to powers, I agree with my noble and learned friend Lord Upjohn in *In re Gulbenkian's Settlements* that although the trustees may, and normally will, be under a fiduciary duty to consider whether or in what way they should exercise their power, the court will not normally compel its exercise. It will intervene if the trustees exceed their powers, and possibly if they are proved to have exercised it capriciously. But in the case of a trust power, if the trustees do not

exercise it, the court will: I respectfully adopt as to this the statement in Lord Upjohn's opinion (p. 525). I would venture to amplify this by saying that the court, if called upon to execute the trust power, will do so in the manner best calculated to give effect to the settlor's or testator's intentions. It may do so by appointing new trustees, or by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear by itself directing the trustees so to distribute. The books give many instances where this has been done, and I see no reason in principle why they should not do so in the modern field of discretionary trusts (see *Brunsden* v. *Woolredge* (1765) 1 Amb. 507, *Supple* v. *Lowson* (1773) 2 Amb. 729, *Liley* v. *Hey* (1842) 1 Hare 580 and *Lewin on Trusts*, 16th ed. (1964), p. 630). Then, as to the trustees' duty of inquiry or ascertainment, in each case the trustees ought to make such a survey of the range of objects or possible beneficiaries as will enable them to carry out their fiduciary duty (cf. *Liley* v. *Hey*). A wider and more comprehensive range of inquiry is called for in the case of trust powers than in the case of powers.

Two final points: first, as to the question of certainty. I desire to emphasise the distinction clearly made and explained by Lord Upjohn ([1970] A.C. 508, 524) between linguistic or semantic uncertainty which, if unresolved by the court, renders the gift void, and the difficulty of ascertaining the existence or whereabouts of members of the class, a matter with which the court can appropriately deal on an application for directions. There may be a third case where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form "anything like a class" so that the trust is administratively unworkable or in Lord Eldon's words one that cannot be executed (*Morice* v. *Bishop of Durham*, 10 Ves.Jr. 522, 527). I hesitate to give examples for they may prejudice future cases, but perhaps "all the residents of Greater London" will serve. I do not think that a discretionary trust for "relatives" even of a living person falls within this category.

I would allow the appeal and make the order suggested earlier in this opinion. The costs of the appellants and of the respondents of this appeal taxed on a common fund basis should be paid out of so much of the trust fund subject to the trust deed of July 17, 1941, as was derived from Bertram Baden deceased.

Appeal allowed.

Solicitors: *Slaughter & May; Gregory, Rowcliffe & Co.*

J. A. G.

Alfred E. Jones, Charles M. Jones, Barry Jones, Audrey Traviss, Charles Augustus Jones and Frank L. Jones *Appellants;*

and

The Executive Officers of the T. Eaton Company Limited, National Trust Company Limited, Executor of the Estate of Francis Bethel, deceased, The Queen Elizabeth Hospital, Toronto, Harley J. Marshall, Irvine Marshall, Lorna Johnston, Ethel Grose, Alvin Marshall, Mabel Weir, Newton Marshall, Eileen Mildred Smith, Barbara Anderson, Thomas Marshall, Alameda Haxton and Bertha Pooke *Respondents.*

1972: October 10, 11; 1973: February 28.

Present: Martland, Judson, Ritchie, Spence and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Trust fund for benefit of any needy or deserving Toronto members of Eaton Quarter Century Club—Whether valid charitable bequest.

The testator's will, executed on August 2, 1934, contained a clause which read, in part, as follows: "On the death of my wife or should she predecease me on my death, to pay the following legacies as soon as conveniently possible out of the residue of my estate: To the Executive Officers of The T. Eaton Company Limited, Toronto, to be used by them as a trust fund for any needy or deserving Toronto members of the Eaton Quarter Century Club as the said Executive Officers in their absolute discretion may decide, the sum of Fifty thousand dollars."

The testator died on May 10, 1936, and after the death of his widow, which took place on April 20, 1965, an application for interpretation was made. The judge of first instance determined that the bequest in question was not a valid charitable bequest. The majority of the Court of Appeal, however, were of the opposite opinion.

Held: The appeal should be dismissed.

If the word "needy" alone had been used by the testator, it was quite plain that the bequest would have been a valid charitable bequest for the relief of poverty. The submission that the words "or deserv-

Alfred E. Jones, Charles M. Jones, Barry Jones, Audrey Traviss, Charles Augustus Jones and Frank L. Jones *Appelants;*

et

The Executive Officers of the T. Eaton Company Limited, National Trust Company Limited, Executor of the Estate of Francis Bethel, deceased, The Queen Elizabeth Hospital, Toronto, Harley J. Marshall, Irvine Marshall, Lorna Johnston, Ethel Grose, Alvin Marshall, Mabel Weir, Newton Marshall, Eileen Mildred Smith, Barbara Anderson, Thomas Marshall, Alameda Haxton and Bertha Pooke *Intimés.*

1972: les 10 et 11 octobre; 1973: le 28 février.

Présents: Les Juges Martland, Judson, Ritchie, Spence et Laskin.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Testaments—Fonds de fiducie au profit de tous les membres de Toronto nécessiteux ou méritants du Eaton Quarter Century Club—S'agit-il d'un legs de charité valide.

Le testament rédigé le 2 août 1934 par le testateur contient une clause qui se lit en partie comme suit: «Au décès de ma femme, ou, si elle devait décéder avant moi, à mon décès, payer aussitôt qu'il est pratiquement possible les legs suivants sur le reste de ma succession: Aux fonctionnaires supérieurs de T. Eaton Company Limited, Toronto, à utiliser comme fonds en fiducie au profit de tous les membres de Toronto nécessiteux ou méritants du Eaton Quarter Century Club, quels qu'ils soient, que les dits fonctionnaires supérieurs, à leur entière discrétion, décideront, la somme de cinquante mille dollars.»

Le testateur est décédé le 10 mai 1936, et une demande en vue d'une interprétation a été faite après le décès de sa veuve qui a eu lieu le 20 avril 1965. Le juge de première instance a décidé que le legs n'était pas un legs de charité valide. La majorité de la Cour d'appel fut d'avis contraire.

Arrêt: L'appel doit être rejeté.

Il semble ressortir très clairement de certains précédents qui si le testateur n'avait employé que le seul mot «nécessiteux», le legs aurait alors constitué un legs de charité valide destiné à soulager la pauvreté.

ing" were so broad and indefinite that they deprived the bequest of its charitable characteristic was not accepted. This particular testator making this will at the time and under the circumstances that he did make it was expressing a charitable intent when he used the word "deserving". As used by the testator, the word meant a person who although not actually poverty stricken was nevertheless in a state of financial depression, perhaps due to a sudden emergency.

The fact that the possible beneficiaries did not include every member of the public but only the Toronto members of the Timothy Eaton Quarter Century Club did not invalidate the charitable trust. The words "Toronto members" were interpreted as meaning those members who were employed by the company in Toronto at the time when they became members. The determination of who were "needy or deserving" Toronto members was in the absolute discretion of the executive officers of the company and, of course, the determination might only be exercised within the limitation set by the testator.

Re Cox, [1955] A.C. 627, distinguished; *Re Scarisbrick, Cockshott v. Public Trustee*, [1951] Ch. 622; *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] A.C. 341; *Re Sutton, Stone v. Attorney-General* (1885), 28 Ch. D. 464; *Re Wall, Pomeroy v. Willway* (1889), 42 Ch. D. 510; *Gibson v. South American Stores (Gath & Chaves) Ltd.*, [1950] Ch. 177; *Bruce v. Presbytery of Deer* (1867), L.R. 1 Sc. & Div. 96; *Re Clark*, [1901] 2 Ch. 110; *Re Coulthurst*, [1951] Ch. 661; *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531; *Re Massey*, [1959] O.R. 608; *Dingle v. Turner*, [1972] 1 All E.R. 878; *McPhail v. Doulton*, [1971] A.C. 424, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Grant J. Appeal dismissed.

G. T. Walsh, Q.C., and *T. W. G. Pratt*, for the appellants.

R. J. Rolls, Q.C., for the respondents, Harley J. Marshall et al.

[1] [1971] 2 O.R. 316, 17 D.L.R. (3d) 652, *sub nom.* Re Bethel.

On ne peut pas accepter la prétention que l'expression «ou méritants» serait d'une signification si large et imprécise qu'elle enlève au legs son caractère charitable. Étant donné la date et les circonstances dans lesquelles il a rédigé son testament, ce testateur particulier a voulu exprimer une intention charitable lorsqu'il a employé le mot «méritant». L'interprétation du mot, tel qu'employé par le testateur, est celle visant une personne qui, bien qu'elle ne fût pas en fait indigente, était néanmoins dans un état de gêne pécuniaire, en raison peut être d'une situation critique imprévue.

La fiducie de charité n'est pas invalide étant donné que les bénéficiaires possibles ne comprennent pas chaque personne faisant partie du public mais seulement les membres de Toronto du Timothy Eaton Quarter Century Club. L'expression «membres de Toronto» doit être interprétée comme désignant les membres qui étaient au service de la compagnie à Toronto à l'époque où ils sont devenus membres. Les fonctionnaires supérieurs de la compagnie ont une entière discrétion pour déterminer quels sont les membres de Toronto «nécessiteux ou méritants». Ce pouvoir discrétionnaire ne peut, naturellement, être exercé que dans les limites fixées par le testateur.

Distinction faite avec l'arrêt: *Re Cox* [1955] A.C. 627. Arrêts mentionnés: *Re Scarisbrick, Cockshott v. Public Trustee*, [1951] Ch. 622; *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] A.C. 341; *Re Sutton, Stone v. Attorney-General* (1885), 28 Ch. D. 464; *Re Wall, Pomeroy v. Willway* (1889), 42 Ch. D. 510; *Gibson v. South American Stores (Gath & Chaves) Ltd.*, [1950] Ch. 177; *Bruce v. Presbytery of Deer* (1867), L.R. 1 Sc. & Div. 96; *Re Clark*, [1901] 2 Ch. 110; *Re Coulthurst*, [1951] Ch. 661; *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531; *Re Massey*, [1959] O.R. 608; *Dingle v. Turner*, [1972] 1 All E.R. 878; *McPhail v. Doulton*, [1971] A.C. 424.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], infirmant un jugement du Juge Grant. Appel rejeté.

G. T. Walsh, c.r., et *T. W. G. Pratt*, pour les appelants.

R. J. Rolls, c.r., pour les intimés, Harley J. Marshall et al.

[1] [1971] 2 O.R. 316, 17 D.L.R. (3d) 652, *sub nom.* Re Bethel.

J. M. Roland and *T. J. Lockwood*, for the respondents, the Executive Officers of T. Eaton Company, Limited.

A. McN. Austin, for the respondent, National Trust Company Limited.

The judgment of the Court was delivered by

SPENCE J.—This is an appeal from the majority judgment of the Court of Appeal for Ontario pronounced on March 8, 1971, whereby that Court allowed an appeal from the order of the Honourable Mr. Justice Grant pronounced on September 9, 1970.

The late Francis Bethel executed his last will and testament on August 2, 1934, and died on May 10, 1936. The issue before both the learned judge of first instance and the Court of Appeal for Ontario was the interpretation of cl. III (j) of the last will and testament of the late Francis Bethel which reads as follows:

(j) On the death of my wife or should she predecease me on my death, to pay the following legacies as soon as conveniently possible out of the residue of my estate:

To the Executive Officers of The T. Eaton Company Limited, Toronto, to be used by them as a trust fund for any needy or deserving Toronto members of the Eaton Quarter Century Club as the said Executive Officers in their absolute discretion may decide, the sum of Fifty thousand dollars.

To the Sick Children's Hospital, 67 College Street, Toronto, or to any institution organized in succession to it, the sum of Fifteen Thousand dollars.

To the Hospital for Incurables, 130 Dunn Avenue, Toronto, or to any institution organized in succession to it, the sum of Five thousand dollars.

To the Benevolent Fund of Zetland Masonic Lodge, A.F. and A.M., Toronto the sum of Five thousand dollars.

I note that the clause does not go into effect until the death of the late Francis Bethel's widow and that her death did not take place until April 20, 1965. Therefore, no application for interpretation was made until after that date. The application for interpretation submitted the following questions to the Court:

J. M. Roland et *T. J. Lockwood*, pour les intimés, the Executive Officers of T. Eaton Company Limited.

A. McN. Austin, pour l'intimée, National Trust Company Limited.

Le jugement de la Cour a été rendu par

LE JUGE SPENCE:—L'appel est à l'encontre d'un arrêt majoritaire de la Cour d'appel de l'Ontario du 8 mars 1971 par lequel cette Cour-là a accueilli un appel d'une ordonnance de l'Honorable Juge Grant rendue le 9 septembre 1970.

Le défunt, Francis Bethel, a rédigé son testament le 2 août 1934 et est décédé le 10 mai 1936. La question sur laquelle le savant juge de première instance et la Cour d'appel de l'Ontario devaient se prononcer portait sur l'interprétation de la clause III, al. j), du testament de feu Francis Bethel, laquelle était ainsi rédigée:

[TRADUCTION] j) Au décès de ma femme, ou, si elle devait décéder avant moi, à mon décès, payer aussitôt qu'il est pratiquement possible les legs suivants sur le reste de ma succession:

Aux fonctionnaires supérieurs de T. Eaton Company Limited, Toronto, à utiliser comme fonds en fiducie au profit de tous les membres de Toronto nécessiteux ou méritants du Eaton Quarter Century Club, quels qu'ils soient, que lesdits fonctionnaires supérieurs, à leur entière discrétion, décideront, la somme de cinquante mille dollars.

Au Sick Children's Hospital, 67 rue College, Toronto, ou à toute institution constituée pour la remplacer, la somme de quinze mille dollars.

Au Hospital for Incurables, 130 avenue Dunn, Toronto, ou à toute institution constituée pour la remplacer, la somme de cinq mille dollars.

Au fonds de bienfaisance de la loge de francs-maçons Zetland, A.F. et A.M., Toronto, la somme de cinq mille dollars.

Je fais remarquer que cette clause n'entre en vigueur qu'après le décès de la veuve de *de cujus* Francis Bethel, et que la veuve n'est décédée que le 20 avril 1965. Par conséquent, aucune demande en vue d'une interprétation n'a été faite avant cette date. Dans la demande en

1. Is the bequest "to the executive officers of the T. Eaton Company Limited, Toronto, to be used by them as a trust fund for any needy or deserving Toronto members of the Eaton Quarter Century Club as the said executive directors in their absolute discretion may decide" a valid charitable bequest?

2. If the answer to the question 1 is "no", is the bequest a valid non-charitable bequest?

3. If either of questions 1 or 2 is answered in the affirmative, what is meant by "Toronto members" of the Eaton Quarter Century Club?

4. If either of questions 1 or 2 is answered in the affirmative, is the determination as to who are "needy or deserving" Toronto members of the Eaton Quarter Century Club in the absolute discretion of the executive officers of The T. Eaton Company Limited?

5. If the answer to question 4 is "no", how are the "needy or deserving" Toronto members of the Eaton Quarter Century Club to be determined?

6. If the answer to both question 1 and question 2 is "no", how is the bequest to be disposed of?

7. If the bequest is to go as on an intestacy as of what date are the next kin to be determined?

Upon the agreement of the parties, Q. 7 was withdrawn prior to the presentation of the application to the Court of first instance. For reasons which I shall outline hereafter, I deem it necessary to answer only Qs. 1, 3 and 4 and I turn immediately to Q. 1 which, shortly stated, is whether the bequest "to the executive officers of the T. Eaton Company Limited, Toronto, to be used by them as a trust fund for any needy or deserving Toronto members of the Eaton Quarter Century Club as the said executive officers in their absolute discretion may decide" is a valid charitable bequest.

Grant J., the learned judge of first instance, determined that the bequest was not charitable

vue d'une interprétation, la cour a été saisie des questions suivantes:

[TRADUCTION] 1. Le legs «aux fonctionnaires supérieurs de T. Eaton Company Limited, Toronto, à utiliser comme fonds en fiducie au profit de tous les membres de Toronto nécessiteux ou méritants du Eaton Quarter Century Club, quels qu'ils soient, que lesdits fonctionnaires supérieurs, à leur entière discrétion, décideront» constitue-t-il un legs de charité valide?

2. Si la réponse à la question 1 est «non», ce legs constitue-t-il un legs non charitable valide?

3. Si l'une ou l'autre des questions 1 ou 2 reçoit une réponse affirmative, que faut-il entendre par l'expression «membres de Toronto» du Eaton Quarter Century Club?

4. Si l'une ou l'autre des questions 1 ou 2 reçoit une réponse affirmative, les fonctionnaires supérieurs de T. Eaton Company Limited ont-ils une entière discrétion pour déterminer quels sont les membres de Toronto «nécessiteux ou méritants» du Eaton Quarter Century Club?

5. Si la réponse à la question 4 est «non», comment détermine-t-on les membres de Toronto «nécessiteux ou méritants» du Eaton Quarter Century Club?

6. Si la réponse aux questions 1 et 2 est «non», comment le legs doit-il être distribué?

7. Si le legs doit être distribué comme s'il s'agissait d'une succession ab intestat, à quelle date faudra-t-il se raporter pour déterminer les parents les plus proches?

Les parties s'étant mises d'accord, la question 7 a été retirée avant que la demande ne soit présentée devant la Cour de première instance. Pour les motifs que j'exposerai ci-après, j'estime nécessaire de ne répondre qu'aux questions 1, 3 et 4, et je passe immédiatement à la question nº 1 qui, en bref, se résume à savoir si le legs «aux fonctionnaires supérieurs de T. Eaton Company Limited, Toronto, à utiliser comme fonds en fiducie au profit de tous les membres de Toronto nécessiteux ou méritants du Eaton Quarter Century Club, quels qu'ils soient, que lesdits fonctionnaires supérieurs, à leur entière discrétion, décideront» constitue un legs de charité valide.

Le savant juge de première instance, le Juge Grant, a décidé que, d'après ses termes, le legs

by the interpretation of the words thereof and Gale C.J.O., giving dissenting reasons in the Court of Appeal for Ontario, came to the same conclusion. The majority of the Court, however, were of the opinion that the words did constitute a charitable bequest.

Firstly, it should be noted that the trust, if any trust is created, is a purpose trust. The executive officers of the T. Eaton Company Limited, Toronto, certainly did not constitute a charitable institution but these officers are to take the funds only upon trust and the problem is to determine whether the purpose of the trust is charitable. The trust is "for any needy or deserving Toronto members of the Eaton Quarter Century Club". The Eaton Quarter Century Club or, as it is more properly known, the Timothy Eaton Quarter Century Club, was founded in 1919 and there was filed as material upon the application an elaborate constitution of that club including a set of by-laws dealing with club matters in a most particular fashion. Perhaps the only relevant article of that constitution, in view of the present situation, is art. 2, ss. 1 and 2, which provide:

Article 2.

SECTION 1. Any employee having completed twenty-one years' continuous service with the T. Eaton Co. Limited shall be eligible for membership.

SECTION 2. Any employee, a member of the Club, having completed twenty-five years' continuous service, shall receive a certificate of membership.

The club carried on independently until 1923 when the T. Eaton Company Limited took an official part in its affairs by presenting gold watches to any new member. In 1924, the president and officers of the club subscribed sums of money to the club and thereafter no fees of any kind have been charged to the members of the club. The club carried on as a general social club until 1930 but by that time so many persons had been employees of the T. Eaton Com-

n'est pas un legs de charité, et le Juge en chef de l'Ontario, le Juge Gale, dans l'exposé de ses motifs de dissidence en la Cour d'appel de l'Ontario, est parvenu à la même conclusion. Cependant, la majorité de la Cour d'appel fut d'avis que les termes du legs en font bien un legs de charité.

Tout d'abord, il convient de noter que la fiducie, s'il y a bien eu création d'une fiducie quelconque, est créée pour la réalisation d'une fin spéciale (*purpose trust*). Les fonctionnaires supérieurs de T. Eaton Company Limited, Toronto, ne constituaient certainement pas une institution de charité, mais ces fonctionnaires ne doivent recevoir les fonds qu'à titre fiduciaire et la question qui se pose est de savoir si la fiducie est à des fins de charité. La fiducie en question est au profit de «tous les membres de Toronto nécessiteux ou méritants du Eaton Quarter Century Club». Le Eaton Quarter Century Club ou, comme il est plus justement appelé, le Timothy Eaton Quarter Century Club, a été fondé en 1919, et au nombre des documents produits relativement à la demande se trouvent une constitution détaillée du club, y compris des statuts qui traitent, jusque dans les moindres détails, des affaires de celui-ci. Compte tenu de la situation présente, le seul article pertinent de cette constitution est, peut-être, l'art. 2, ss. 1 et 2, qui stipule:

[TRADUCTION] Article 2.

SECTION 1. Tout employé ayant complété vingt et une années de service ininterrompu chez T. Eaton Co. Limited sera admissible à devenir membre.

SECTION 2. Tout employé, membre du club, ayant complété vingt-cinq années de service ininterrompu, recevra un certificat de membre.

Le club a poursuivi son existence de manière indépendante jusqu'en 1923, date à laquelle la compagnie T. Eaton a pris part officiellement à ses activités en offrant des montres en or à tout nouveau membre. En 1924, le président et les fonctionnaires du club ont souscrit des sommes d'argent au club et, par la suite, aucune cotisation n'a été demandée aux membres. Le club a continué en tant que club social ordinaire jusqu'en 1930, mais à ce moment-là, les personnes

pany Limited for twenty-five years that the membership became too unwieldy to operate as a social club and from that date until this, it would appear that the main and sole function of the T. Eaton Quarter Century Club was the presentation of certificates and watches or like tokens to each employee upon reaching twenty-five years of service with the company.

There were also filed upon the application extracts from the T. Eaton Company personnel policy manual dealing with the Timothy Eaton Quarter Century Club.

The by-laws of the club had provided in one paragraph of s. 4 that one of the duties of the membership committee was "to report any case of sickness, death or distress among the Club members to the Secretary and in a general way to look after the welfare of the members", and in the extract from the personnel policy manual of the T. Eaton Company Limited para. 7 reads as follows:

MISCELLANEOUS

Comforts are provided and necessary welfare arrangements are made by the Company in case of the illness of any member of the Quarter Century Club.

Mr. Robert V. A. Jones, the secretary of the T. Eaton Company Limited, in his affidavit producing the material to which I have referred, deposed in para. 4:

4. Initially the activities of the Club were of a social nature, the most important being the annual banquet. By 1930 the Club had such a large membership that social events were discontinued and the main Club activities since that date have consisted of the presentation of gifts and certificates by the Company on enrolment in the Club and welfare arrangements by the Company in the case of the illness of Club members.

qui avaient vingt-cinq années d'ancienneté à la T. Eaton Company Limited représentaient un nombre si important qu'il était devenu trop difficile d'administrer l'ensemble des membres dans le cadre d'un club social; aussi, à compter de cette date jusqu'à aujourd'hui, il semblerait que la principale et seule fonction du T. Eaton Quarter Century Club ait été d'offrir des certificats et des montres ou d'autres preuves d'appréciation similaires à chacun des employés venant de compléter vingt-cinq ans de service dans la compagnie.

Parmi les documents produits relativement à la demande figurent également des extraits du manuel sur les politiques en matière de personnel de T. Eaton Company, dans lesquels il est question du Timothy Eaton Quarter Century Club.

Les statuts du club stipulaient dans l'un des alinéas de la s. 4 que l'un des rôles du comité d'adhésion était «de signaler au secrétaire tout cas de maladie, de décès ou de détresse existant parmi les membres du club, et d'une façon générale de veiller au bien-être des membres», et dans l'extrait du manuel sur les politiques en matière de personnel de la compagnie T. Eaton Company Limited, le par. 7 est rédigé comme suit:

[TRADUCTION] DIVERS

En cas de maladie d'un membre du Quarter Century Club, la compagnie lui apporte des consolations et s'occupe des dispositions nécessaires relatives au bien-être.

M. Robert V. A. Jones, secrétaire de T. Eaton Company Limited, a déclaré au par. 4 de sa déclaration sous serment réunissant les pièces que j'ai mentionnées:

[TRADUCTION] 4. Au début, les activités du club avaient un caractère social, la plus importante étant le banquet annuel. Dès 1930, le club avait un nombre si important d'adhérents que les réunions mondaines ont été abandonnées, et depuis cette date les principales activités du club ont consisté à remettre aux nouveaux membres des cadeaux et des certificats offerts par la compagnie et à prendre des dispositions pour assurer le bien-être des membres du club en cas de maladie.

Membership in the rather vaguely defined Timothy Eaton Quarter Century Club has, according to Mr. Jones, now reached approximately 7,000 persons who are still living who served the T. Eaton Company for twenty-five years and who were still with the T. Eaton Company Limited at the time of their retirement. There must be, in addition, a very considerable number of persons who were members having served the T. Eaton Company Limited for the required twenty-five years but who left the employment of the company for one reason or another prior to retirement. Of that 7,000, approximately 3,500 were, at the time of Mr. Jones giving his affidavit, *i.e.*, October 7, 1969, still employed by the company.

The clause in question provides that the funds are to be used for any "needy or deserving Toronto members of the Eaton Quarter Century Club". If the word "needy" alone had been used by the testator then authority would seem to have made it quite plain that the bequest would have been a valid charitable bequest for the relief of poverty: see *Re Scarisbrick, Cockshott v. Public Trustee*[2]. But it is said that the words "or deserving" are so broad and indefinite that they deprive the bequest of its charitable characteristic.

It would seem plain that in order to qualify as a charitable trust each of the purposes or objects to which the trust funds may be applied must fall within that charitable characteristic. In *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson and others*[3], Lord MacMillan said at p. 350:

As the law of England stands, it is impossible to sustain this bequest as valid. The testator has empowered his executors to distribute the residue of his estate inter alia among either charitable objects or benevolent objects and has thereby empowered them to devote the whole bequest, if they please, to

[2] [1951] Ch. 622.
[3] [1944] A.C. 341.

Selon M. Jones, le nombre des membres appartenant à cette association assez vaguement définie qu'est le Timothy Eaton Quarter Century Club, atteint actuellement le chiffre d'environ 7,000 personnes, toujours en vie, qui ont été au service de T. Eaton Company pendant vingt-cinq ans et qui étaient encore des employés de T. Eaton Company Limited au moment où elles ont pris leur retraite. A celles-ci, il faudrait ajouter un nombre considérable de personnes qui ont été au service de T. Eaton Company Limited pendant les vingt-cinq ans requis, mais qui ont quitté la compagnie pour une raison ou une autre avant de prendre leur retraite. Sur les 7,000 personnes, environ 3,500 étaient toujours employées par la compagnie au moment où M. Jones a produit sa déclaration sous serment, c'est-à-dire le 7 octobre 1969.

La clause en litige stipule que les fonds doivent être utilisés au profit de «membres de Toronto nécessiteux ou méritants du Eaton Quarter Century Club, quels qu'ils soient». Il semble ressortir très clairement de certains précédents que si le testateur n'avait employé que le seul mot «nécessiteux», le legs aurait alors constitué un legs de charité valide destiné à soulager la pauvreté: Voir *Re Scarisbrick, Cockshott v. Public Trustee*[2]. Mais l'expression «ou méritants» serait, dit-on, d'une signification si large et imprécise qu'elle enlève au legs son caractère charitable.

Il semble évident que, pour que le fonds de fiducie ait le caractère d'une fiducie de charité, les buts ou objets auxquels il peut s'appliquer doivent présenter ce caractère charitable. Dans l'arrêt *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson and others*[3], Lord MacMillan a déclaré à la p. 350:

[TRADUCTION] On ne peut, dans l'état actuel du droit anglais, soutenir que ce legs est valide. Le testateur a autorisé ses exécuteurs testamentaires à distribuer le reste de la succession à, notamment, soit des fins charitables soit des fins de bienfaisance, et les a autorisés ainsi à consacrer si bon leur semble la

[2] [1951] Ch. 622.
[3] [1944] A. C. 341.

benevolent objects, a class of objects which has over and over again been held by the courts to be too uncertain.

The respondent executive officers seek to support the charitable end of this bequest by two arguments; firstly, it is submitted that the word "or" is not always a disjunctive word but may on occasion be conjunctive so that both the word "needy" and the word "deserving" may, joined by a conjunctive, be considered to be of like meaning, and, secondly, they submit that even if the word "or" were disjunctive then the testator in using the word "deserving" was expressing a charitable intent.

In my opinion, I need not deal with the first argument because I am ready to hold that this particular testator making this will on the date and under the circumstances that he did make it was expressing a charitable intent when he used the word "deserving". It is true that the word "deserving" was, as Pearson J. said in *Re Sutton, Stone v. Attorney-General*[4], at p. 465:

> . . . so vague that I do not know what meaning could be attached to it. Almost any object might be said to be a "deserving" object.

However, it is perfectly proper to interpret the words of a will in the context of that will and when the words are ambiguous it is proper to consider the factual situation in which the testator wrote those words. A persuasive example of the use of context was the decision *Re Wall, Pomeroy v. Willway*[5]. There, the Court was considering a clause which read:

> "This will make the sum to be put in consols £2500. Now I desire the interest of this £2500 absolutely and for ever to be divided into annuities of ten pounds each, and to be paid half-yearly to an equal number of men and women not under fifty years of age, Unitarians, and who attend *Lewin's Mead* Unitarian

[4] (1885), 28 Ch. D. 464.

[5] (1889), 42 Ch. D. 510.

totalité du legs à des fins de bienfaisance, une catégorie que les tribunaux ont maintes et maintes fois estimée comme trop incertaine.

Les intimés cherchent à établir la fin charitable de ce legs en présentant deux arguments: tout d'abord, ils prétendent que le mot «ou» n'est pas toujours un mot disjonctif mais peut parfois être conjonctif de sorte que le mot «nécessiteux» et le mot «méritant» peuvent, unis par une particule conjonctive, être considérés comme ayant le même sens, et, ensuite, les appelants allèguent que même si le mot «ou» était disjonctif, le testateur en utilisant le mot «méritant» a quand même voulu exprimer une intention charitable.

A mon avis, il n'est pas nécessaire que j'examine le premier argument car je suis prêt à conclure qu'étant donné la date et les circonstances dans lesquelles il a rédigé son testament, ce testateur particulier a voulu exprimer une intention charitable lorsqu'il a employé le mot «méritant». Il est vrai que le mot «méritant» est, comme le Juge Pearson l'a déclaré dans *Re Sutton, Stone v. Attorney General*[4], à la p. 465:

> [TRADUCTION]. . . si vague que je ne sais pas quel sens on pourrait lui attribuer. Presque n'importe quelle fin peut être considérée comme étant une fin «méritante».

Il est cependant parfaitement normal d'interpréter les termes d'un testament dans le contexte de ce testament, et lorsque les termes sont ambigus, il est bon de considérer les circonstances dans lesquelles le testateur a employé ces termes. La décision *in Re Wall, Pomeroy v. Willway*[5], fournit un exemple très convaincant de l'utilisation du contexte. Dans cette affaire, la Cour examinait une clause dont le texte était le suivant:

> [TRADUCTION] «Cela porte à £2,500 la somme qui doit être placée dans des fonds consolidés. Or, je désire que les intérêts produits par ces £2,500 soient, formellement et définitivement, divisés en annuités de 10 livres chacune, qui seront versées deux fois l'an à un nombre égal d'hommes et de femmes âgés d'au

[4] (1885), 28 Ch. D. 464.

[5] (1889), 42 Ch. D. 510.

Chapel or chapels in *Bristol*; a tablet to be placed in *Lewin's Mead* Chapel to give the information of gift, otherwise how should the deserving know of it."

Certainly all men and women who attended Lewin's Mead Unitarian Chapel or the Bristol chapel could not be considered as being poor so as to qualify the trust as charitable but the specification of those only who were not under fifty years of age and the use of the word "deserving" Kay J. held justified him in coming to the conclusion:

> . . . I cannot help thinking that the true construction of these words must be that poor members of the congregation who have passed that age, and are less able to provide for themselves than they would be if they were younger, are intended to be benefited. I hold, therefore, that the gift is charitable, and good so far as the pure personalty of the testator is concerned.

The decision has been criticized as being one depending on the limitation of the gift to the aged but I am of the opinion it must be considered as having a broader application. It was not only those who were over fifty years of age who qualified but they must also be "deserving".

In Re Gibson v. South American Stores (Gath & Chaves) Ltd.[6], the Court of Appeal entered into a most meticulous examination of all the circumstances surrounding the question of determining the meaning of the clause to hold that it was charitable.

In the present case, there is no indication whatsoever in any of the material filed upon the appeal as to the history of the testator. It would have assisted had we known whether the testator had been himself an employee of the T. Eaton Company Limited and a member of the Timothy Eaton Quarter Century Club. However, even if he were not, the testator did exhib-

[6] [1950] Ch. 177.

moins cinquante ans, Unitariens, et qui fréquentent le temple unitarien *Lewin's Mead* ou des temples à *Bristol;* une plaque sera placée dans le temple *Lewin's Mead* afin de donner avis de la donation, autrement comment les personnes méritantes pourraient-elles en avoir connaissance.»

Assurément, les hommes et les femmes qui fréquentaient le temple unitarien Lewin's Mead ou le temple de Bristol ne pouvaient pas tous être considérés comme des pauvres de tel sorte que la fiducie pût être qualifiée de fiducie de charité, mais la restriction aux seules personnes ayant au moins cinquante ans, et l'utilisation du mot «méritant» ont conduit le Juge Kay a décider qu'il pouvait adopter la conclusion suivante:

> [TRADUCTION] . . . Je suis intimement persuadé que le sens réel de ces mots est que ce sont les paroissiens indigents ayant dépassé cet âge, et qui sont donc moins capables que s'ils étaient plus jeunes de pourvoir à leurs besoins, qui sont destinés à être les bénéficiaires. J'estime, par conséquent, que la donation est charitable, et valable en ce qui concerne les biens purement mobiliers du testateur.

Cette décision a fait l'objet de critiques du fait qu'elle dépendait d'une restriction de la donation aux personnes âgées, mais je suis d'avis qu'on doit la considérer comme étant d'une application plus large. Ces personnes ne devenaient pas admissibles par le seul fait d'avoir plus de cinquante ans, elles devaient également être «méritantes».

Dans l'affaire *Re Gibson v. South American Stores (Gath & Chaves) Ltd.*[6], la Court of Appeal a entrepris un examen très détaillé de toutes les circonstances entourant la question de la détermination du sens de la clause pour conclure que celle-ci constituait un legs de charité.

Dans la présente affaire, aucun des documents déposés en appel ne donne la moindre indication sur les antécédents du testateur. Il aurait été utile de savoir si le testateur a été lui-même au service de T. Eaton Company Limited et membre du Timothy Eaton Quarter Century Club. Cependant, même s'il ne l'a pas été, le testateur a quand même manifesté la

[6] [1950] Ch. 177.

it a very considerable appreciation of the personnel of that club. As I have pointed out, they had to have been employees of the T. Eaton Company Limited for twenty-five years so that they were certainly not young people. I note hereafter the statement in the factum of the executive officers of the T. Eaton Company Limited confirming this.

The by-laws of the club as originally constituted provided for some reference to the welfare of the members in the provision which I have cited and when the company took over as it were the operation of the club there is the same reference to the welfare of the members in case of illness. The testator executed his will in 1934 when the economic depression was far from its termination and died in 1936 when there still was very considerable degree of economic depression. Even at that time, the number of employees of the T. Eaton Company Limited who had served the company for twenty-five years must have been very large. It would be inevitable that some of those members, particularly the ones who had retired from service with the company, might well become "needy or deserving". Even if such members were not so poverty stricken as being properly describable as "needy", illness of the member himself or of some member of his family, financial misfortune, or family tragedy might well justify in describing his condition as "deserving".

The testator's will was very carefully drafted with a most specific series of testamentary trust clauses. He disposed of an estate which was probated at little less than $700,000. He evidently owned three different residential properties and provided that his widow should have one for her life, another, Charles Melvin Jones might occupy during his lifetime and after his death his wife might continue to do so. He described Charles Melvin Jones as being his nephew although in truth the devisee was a nephew of the testator's wife. As to the third house, he made like provision in favour of a brother-in-law.

grande considération qu'il avait pour les membres du club. Ainsi que je l'ai souligné, ces membres devaient avoir été employés par T. Eaton Company Limited pendant vingt-cinq ans, de sorte qu'il ne s'agissait certainement pas de jeunes gens. J'attire plus loin l'attention sur la déclaration figurant dans le factum des fonctionnaires supérieurs de T. Eaton Company Limited, qui confirme ce fait.

Dans leur forme primitive, les statuts du club, dans la disposition que j'ai citée, faisaient quelque peu mention du bien-être des membres, et lorsque la compagnie a, en quelque sorte, pris en main les activités du club, il y a la même mention du bien-être des membres en cas de maladie. Le testateur a rédigé son testament en 1934, alors que la crise économique était loin d'être terminée, et il décéda en 1936, alors que la crise économique était encore à un point très élevé. Même à cette époque, les employés de T. Eaton Company Limited qui avaient été au service de la compagnie pendant vingt-cinq ans devaient être très nombreux. Il était inévitable que certains de ces membres, en particulier ceux qui avaient pris leur retraite de la compagnie, pussent devenir «nécessiteux ou méritants». Même si de tels membres n'étaient pas miséreux au point d'être justement décrits comme «nécessiteux», la maladie qui frappait l'un deux ou quelque membre de sa famille, des revers de fortune, ou des drames familiaux pouvaient très bien justifier qu'on qualifie leur état de «méritant».

Le testateur a rédigé très soigneusement son testament, y portant une série très spécifique de clauses relatives à la fiducie testamentaire. Il y cédait une succession dont la valeur a été homologuée à un peu moins de $700,000. Il est clair qu'il possédait trois propriétés résidentielles différentes et il a stipulé que sa veuve pourrait vivre dans l'une de celle-ci, qu'une autre résidence pourrait être occupée par Charles Melvin Jones de son vivant et, après sa mort, par sa femme. Il a décrit Charles Melvin Jones comme étant son neveu bien qu'en réalité le légataire était un neveu de la femme du testateur. Quant

In many cases throughout the will, gifts of income were not to result in the devisee having an income smaller than the stated amount and the testator very carefully directed encroachments on principal to maintain the income benefits at not less than the stated level, and also the manner in which those encroachments were to be treated for estate accounting purposes. As I have said, in short, the whole will was very carefully done. Therefore, I think that a view attributing to the word "deserving", one of the non-charitable meanings which have been suggested throughout the argument here and below, would fail to do justice under these circumstances to the testator's very evident ability and intent. It has been well said that a rational meaning should be given to every word in the testator's will if it is possible and that capricious or whimsical intent should be avoided unless the words require it. Halsbury's Laws of England, 3rd ed., vol. 39, pp. 973 ff. and 986-7.

In *Bruce et al. v. The Presbytery of Deer et al*[7]., Lord Chelmsford L.C. said at p. 97:

It is quite clear that this was intended as a charitable bequest; and therefore it must be carried out, if the general object of the testator can be ascertained. When it is said that charitable bequests must receive a benignant construction, the meaning is, that when the bequest is capable of two constructions, one which would make it void, and the other which would render it effectual, the latter must be adopted;

It has been suggested that a member of the Timothy Eaton Quarter Century Club may be considered as deserving because of merit, industry, intelligence, imagination, honesty, sobriety

[7] (1867), L.R. 1 Sc. & Div. 96.

à la troisième demeure, il en dispose de la même manière en faveur d'un beau-frère.

Dans plusieurs cas, le testament précise que le revenu de donations faites sous forme de revenu ne doit pas être inférieur au montant déclaré; et le testateur a pris grand soin d'ordonner que des prélèvements soient effectués sur le capital afin que soient maintenues au niveau prévu les prestations de revenu, et également de préciser la manière dont ces prélèvements devaient s'effectuer afin de faciliter les opérations comptables de la succession. Bref, comme je l'ai déjà dit, l'ensemble du testament est très soigneusement rédigé. Par conséquent, je pense que vouloir attribuer au mot «méritant» une des acceptions n'ayant rien à voir avec la charité qui ont été proposées au cours des plaidoiries présentées en cette Cour et dans les Cours d'instance inférieure serait, dans les circonstances présentes, ne pas rendre justice au savoir-faire très manifeste ainsi qu'à l'intention bien claire du testateur. On a dit avec raison que l'on devrait donner dans la mesure du possible un sens rationnel à chacun des mots contenus dans le testament du testateur, et que l'on devrait éviter d'y voir une intention capricieuse ou bizarre à moins qu'elle ne soit imposée par les mots eux-mêmes. Voir Halsbury's Laws of England, 3e éd., v. 39, pp. 973 et s. et 986-7.

Dans l'affaire *Bruce et al. v. The Presbytery of Deer et al*[7], le Lord Chancelier Chelmsford a déclaré à la p. 97:

[TRADUCTION] Il est tout à fait clair qu'on a voulu faire un legs de charité; et, par conséquent, cette intention doit être exécutée si le but général du testateur peut être établi. Lorsqu'on dit que les legs de charité doivent recevoir une interprétation indulgente, cela signifie que lorsqu'un legs peut recevoir deux interprétations, l'une qui le rendrait nul, et l'autre qui le rendrait valide, c'est la deuxième interprétation qui doit être adoptée;

On a exprimé l'avis qu'un membre du Timothy Eaton Quarter Century Club peut être considéré comme méritant en raison de sa valeur, de son application, de ses qualités d'in-

[7] (1867), L.R. I Sc. & Div. 96.

and even punctuality, or loyalty, but it must be remembered that the testator was not directing a distrubution of the funds of the T. Eaton Company Limited which might well have been interested in the exhibition by its employees of any of those virtues but was directing the disposal of his own estate and I find it hard to believe that he would consider any retired members of the T. Eaton Quarter Century Club to be "deserving" because he had been punctual or loyal. I am of the opinion that the only proper interpretation of the words "or deserving" following the word "needy" and as used by this testator at the time he did use it means a person who although not actually poverty stricken was nevertheless in a state of financial depression, perhaps as I said due to a sudden emergency and that his purpose is sufficient to qualify as a charitable trust: *Re Clark*[8]; *Re Coulthurst*[9], *per* Eversheed M. R. at pp. 665-6.

I have therefore, with respect, come to the conclusion as expressed by Jessup J.A. in his majority reasons for the Court of Appeal for Ontario:

> In my opinion, therefore, the intention of the testator, by his use of the word "deserving", must be taken to benefit not only the necessitous whom he designated by the word "needy" but also those of moderate means who might require financial assistance in the exigencies from time to time arising.

Having come to the conclusion that the provision in the will constitutes a trust for the relief of poverty, I have now to determine whether it is valid in view of the fact that the possible beneficiaries do not include every member of the public but only the Toronto members of the Timothy Eaton Quarter Century Club. As I have pointed out, that limitation is far from confining as according to the evidence of the secretary-treasurer of the Timothy Eaton Company Limited it would include at least 7,000 persons and

[8] [1901] 2 Ch. 110.

[9] [1951] Ch. 661.

telligence, d'imagination, d'honnêteté, de sobriété, et même en raison de sa ponctualité ou de sa loyauté, mais il faut se souvenir que le testateur n'ordonnait pas la distribution des fonds de T. Eaton Company Limited, qui pouvait très bien être intéressée à ce que ses employés manifestent n'importe laquelle ou n'importe lesquelles de ces qualités, mais qu'il ordonnait la disposition de sa propre succession, et il me semble difficile de croire qu'il considérait tout membre retraité du T. Eaton Quarter Century Club comme étant «méritant» parce qu'il avait été ponctuel ou loyal. Je suis d'avis que la seule interprétation juste de l'expression «ou méritant», à la suite du mot «nécessiteux» et telle qu'employée par le testateur à l'époque où il l'a employée, est celle visant une personne qui, bien qu'elle ne fût pas en fait indigente, était néanmoins dans un état de gêne pécuniaire, en raison peut être, comme je l'ai dit, d'une situation critique imprévue, et que le but du testateur est suffisant pour qu'il y ait legs de charité. Voir *Re Clark*[8]; *Re Coulthurst*[9], d'après le maître des rôles Eversheed, pp. 665-6.

Je suis par conséquent parvenu, respectueusement, à la même conclusion que celle que le Juge d'appel Jessup a exposée dans ses motifs de jugement au nom de la majorité de la Cour d'appel de l'Ontario:

> [TRADUCTION] Je pense, par conséquent, qu'en utilisant le mot «méritant», le testateur a voulu avantager non seulement les personnes dans le besoin qu'il a désignées par le mot «nécessiteux», mais également les personnes de moyens modestes qui pourraient avoir besoin d'une aide financière dans les cas pressants qui peuvent surgir de temps en temps.

Étant venu à la conclusion que la disposition testamentaire crée une fiducie destinée au soulagement de la pauvreté, je dois maintenant déterminer si elle est valide étant donné que les bénéficiaires possibles ne comprennent pas chaque personne faisant partie du public mais seulement les membres de Toronto du Timothy Eaton Quarter Century Club. Comme je l'ai indiqué, cette limitation est loin d'être trop restrictive car, d'après le témoignage du secrétaire-trésorier de Timothy Eaton Company Limited,

[8] [1901] 2 Ch. 110.

[9] [1951] Ch. 661.

so might be considered to apply to a significant portion of the general public. I need not however rest my view as to the validity of the trust upon that ground for I am of the opinion that when a trust is not only charitable in the sense outlined by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel*[10], but is a trust for one of those four purposes, *i.e.* for the relief of poverty, then the Courts have not required the element of public benefit in order to declare in favour of the validity of the trust. In Canada the decision of the Judicial Committee in *Re Cox*[11] has been considered the authoritative delineation of the problem. However, in that particular case the Judicial Committee found that the trust in question was not one limited to the relief of poverty but was one which was within any of the four classes set out by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel,* and I am of the opinion therefore that that case is not an authority for requiring public benefit in cases where the trust was limited to the relief of poverty. Such was the opinion which Wells J. (as he then was) arrived at after a very carefully considered judgment in *Re Massey*[12], and it would seem to be in accord with the decisions of the Court of Appeal in England in *Gibson v. South American Stores (Gath & Chaves) Ltd.*[13]. The Court of Appeal found as a valid trust for the relief of poverty the creation of a fund to be applied at the discretion of the London Board of Directors for granting gratuities, pensions or allowances to persons "who are or shall be necessitous and deserving and who for the time being are, or have been, in the company's employ . . . and the wives, widows, husbands, widowers, children, parents and other dependants of any person who for the time being is or would, if living, have been, himself or herself a member of the class of beneficiaries." Evershed M.R. said at p. 191:

[10] [1891] A.C. 531.
[11] [1955] A.C. 627.
[12] [1959] O.R. 608.
[13] [1950] Ch. 177.

le club comprend au moins 7,000 personnes et peut ainsi être considéré comme groupant une tranche appréciable du grand public. Je n'ai toutefois pas à m'appuyer sur ce motif relativement à la validité de la fiducie, car je suis d'avis que lorsqu'une fiducie n'en est pas simplement une de charité suivant la définition de Lord Macnaghten dans l'arrêt *Commissioners for Special Purposes of Income tax v. Pemsel*[10], mais est une fiducie destinée à la réalisation d'une de ces quatre fins, soit le soulagement de la pauvreté, les tribunaux n'exigent pas, pour prononcer sa validité, la présence de l'élément bienfait public. Au Canada, l'arrêt du Comité judiciaire dans l'affaire *Re Cox*[11], a été considéré comme le précédent faisant autorité quant à la délinéation du problème. Toutefois, dans cette affaire-là, le Comité judiciaire a décidé que la fiducie en cause n'en était pas une qui était restreinte au soulagement de la pauvreté mais qu'elle était visée par chacune des quatre catégories énumérées par Lord Macnaghten dans l'arrêt *Commissioners for Special Purposes of Income Tax v. Pemsel,* et je suis par conséquent d'avis que l'arrêt *Cox* ne peut servir de précédent pour exiger qu'il y ait bienfait public lorsque la fiducie est limitée au soulagement de la pauvreté. Telle est l'opinion que se fit le Juge Wells (alors juge puîné) à la fin d'un jugement très fouillé dans l'affaire *Re Massey*[12], et elle paraît être en accord avec les décisions de la Court of Appeal en Angleterre dans *Re Gibson v. South American Stores (Gath & Chaves) Limited*[13]. La Court of Appeal avait conclu que la création d'un fonds à utiliser à la discrétion du bureau d'administration de Londres aux fins de distribuer des gratifications, pensions ou allocations aux personnes «qui sont ou seront nécessiteuses ou méritantes et qui pour l'instant sont, ou ont été, employées par la compagnie . . . et aux épouses, veuves, maris, veufs, enfants, parents et autres personnes à charge de quiconque pour l'instant est ou aurait été, si vivant, lui-même ou elle-même un membre de la catégorie de bénéficiaires», constituait une fiducie valide destinée au soulagement de la pauvreté. Le maître des rôles Evershed a dit, à la p. 191:

[10] [1891] A.C. 531.
[11] [1955] A.C. 627.
[12] [1959] D.R. 608.
[13] [1950] Ch. 177.

There is I think no doubt that the emphasis which has been placed in recent years on the need for that public characteristic had to some degree been lost sight of in earlier cases, and its emphatic affirmation (the last case I have in mind is *Gilmour v. Coats,* [1949] A.C. 426) in the House of Lords, undoubtedly raises the question whether certain decisions of courts of first instance on trusts in favour of poor persons of various categories are now consistent with the principles which have been stated.

[TRADUCTION] Il n'y a, je crois, aucun doute que l'importance accordée ces dernières années à la nécessité de ce caractère public avait jusqu'à un certain point été oubliée dans les causes antérieures, et son affirmation vigoureuse (la dernière cause que j'ai à l'esprit est l'affaire *Gilmour v. Coats,* [1949], A.C. 426, Chambre des Lords) soulève indubitablement la question de savoir si certaines décisions de première instance ayant trait aux fiducies créées au profit de personnes pauvres de diverses catégories concordent maintenant avec les principes énoncés.

And continued at p. 192:

Et il a poursuivi à la p. 192:

The question, however, arises (which Mr. Milner Holland invited us to answer negatively): is the same true when the trust is one for the relief of poverty?

[TRADUCTION] Cependant, la question suivante se pose (question que monsieur Milner Holland nous a invités à répondre négativement): en est-il de même lorsque la fiducie est pour le soulagement de la pauvreté?

And at p. 196:

Et à la p. 196:

I think that for practical purposes it is clear, and Mr. Milner Holland has conceded, that the point raised in the present case was inevitably and directly involved also in the *Laidlaw* case; [1935 unreported] for on the face of it in that case an express trust had been established in perpetuity to provide for poor employees of a particular business concern. In the court of first instance, the decision had apparently been given in favour of the testator's next of kin or residuary legatees, that the trusts which I have read did not constitute a valid charitable trust. An appeal was brought to this court after the Attorney-General had been added as a party. . . . In this court, however, the Attorney-General does not appear to have been called upon to argue. As I have already stated, no note exists of the terms of the judgment, but the appeal was allowed and the order was, so far as relevant, that the legacy was "a valid charitable legacy for the benefit of the persons who shall from time to time and for the time being be poor members or poor former members of the staff" of this company.

[TRADUCTION] Je crois qu'il est pratiquement manifeste, et monsieur Milner Holland le concède, que le point soulevé en la présente espèce était également en cause, directement et de façon inévitable, dans l'affaire *Laidlaw* [1935, non publiée] car de toute évidence, dans cette affaire-là, une fiducie en termes nettement exprimés avait été établie à perpétuité au profit d'employés pauvres d'une entreprise particulière. En première instance, on avait apparemment décidé en faveur des plus proches parents ou légataires résiduels du testateur que la fiducie dont j'ai lu les termes ne constituait pas une fiducie de bienfaisance valide. Un appel fut interjeté à cette Cour après que le procureur général eut été appelé comme partie aux procédures. . . . En cette Cour, toutefois, le procureur général ne semble pas avoir été invité à faire de plaidoirie. Comme je l'ai dit, il n'y a pas de note consignant les termes du jugement, mais l'appel fut accueilli et l'ordonnance dit, dans la partie qui nous intéresse, que le legs constituait «un legs de charité valide au profit des personnes qui seront de temps à autre et pour l'instant des membres pauvres ou des membres anciens pauvres du personnel» de la compagnie.

. . . I conclude that we are here bound, and that this particular trust which I have already many times mentioned must be treated as a valid charitable trust.

. . . Je conclus que nous sommes liés en l'espèce, et que la fiducie en litige dont j'ai fait mention à de nombreuses reprises doit être considérée comme une fiducie de charité valide.

The same result was reached in *Re Coulthurst, supra,* where a fund was to be applied by a bank as trustee "to or for the benefit of such . . . of the . . . widows and orphan children of deceased officers and deceased ex-officers" of the bank "as the bank shall in its absolute discretion consider by reason of his, her or their financial circumstances to be most deserving of such assistance". Such fund was held to be a valid charitable trust.

Judgment upon that appeal was again given for the Court of Appeal by Evershed M.R. with Jenkins and Hodson L. JJ. concurring.

Finally, the House of Lords have dealt with this matter in *Dingle v. Turner*[14]. There the testator had made a dispostion of his estate by the direction to the trustees to invest a sum of money and hold it in the name of certain pension fund trustees upon a trust to apply the income in paying pensions to poor employees of E. Dingle & Company Limited, who were of the age of 60 years at least or being of the age of 45 at least and were incapacitated from earning their living by reason of some physical or mental infirmity. The House of Lords affirming the judgment of Megarry J. held that the trust was a charitable trust. Lord Cross, giving the main opinion, referred *inter alia* at p. 887 to the decision of the Judicial Committee in *Re Cox, supra,* and expressed the same view of it that I have expressed heretofore. At p. 888 Lord Cross said:

But the "poor members" and "poor employees" decisions were a natural development of the "poor relations" decisions and to draw distinction between different sorts of "poverty" trusts would be quite illogical and could certainly not be said to be introducing "greater harmony" into the law of charity. Moreover, although not as old, the "poor relations" trust and "poor employee" trusts have been recognized as charities for many years; there are now a

[14] [1972] 1 All E.R. 878.

Une décision identique a été rendue dans l'affaire *Re Coulthurst,* précitée, dans laquelle un fonds devait être employé à titre fiduciaire par une banque «à . . . celle(s) (ou à ceux) . . . des veuves et enfants orphelins de fonctionnaires décédés et d'ex-fonctionnaires décédés que la banque, à son entière discrétion, estimera être, en raison de sa ou de leurs situations financière(s), la ou les plus méritante(s) (ou les plus méritants), ou l'employera à leur profit». Il fut jugé que semblable fonds constituait une fiducie de charité valide.

Le jugement dans cette dernière affaire a été encore une fois rendu au nom de la Court of Appeal par le maître des rôles Evershed, avec qui les Juges Jenkins et Hodson étaient d'accord.

Finalement, la Chambre des Lords a traité de cette question dans l'affaire *Dingle v. Turner*[14]. Le testateur avait fait un legs obligeant ses exécuteurs testamentaires à investir une somme d'argent et à la garder au nom de certains fiduciaires de fonds de pension qui seraient fiduciairement tenus d'employer le revenu au versement de pensions aux employés pauvres de E. Dingle & Company Limited âgés d'au moins soixante ans, ou âgés d'au moins quarante-cinq ans lorsqu'incapables de gagner leur vie en raison d'une infirmité physique ou mentale. La Chambre des Lords, confirmant le jugement du Juge Megarry, a décidé que la fiducie était une fiducie de charité. Lord Cross, qui a rédigé les motifs principaux, a mentionné, entre autres, à la p. 887, la décision du Comité judiciaire dans l'affaire *Re Cox,* précitée, et il a exprimé le même avis que celui que j'ai exprimé plus haut. A la p. 888, il a dit:

[TRADUCTION] Mais les décisions ayant trait aux «membres pauvres» et celles ayant trait aux «employés pauvres» étaient le prolongement naturel des décisions relatives aux «parents pauvres», et faire une distinction entre diverses sortes de fiducies «de pauvreté» serait fort peu logique et ne pourrait sûrement pas être considéré comme introduisant une «plus grande harmonie» du droit en matière d'œuvres de charité. En outre, bien qu'elles ne datent pas

[14] [1972] 1 All E.R. 878.

large number of such trusts in existence; and assuming, as one must, that they are properly administered in the sense that benefits under them are only given to people who are fairly to be said to be, according to current standards, "poor persons" to treat such trusts as charities is not open to any practical objection. So it seems to me that it must be accepted that wherever else it may hold sway, the *Compton* rule has no application in the field of a trust for the relief of poverty and that there the dividing line between a charitable trust and a private trust lies where the Court of Appeal drew it in *Re Scarisbrick*.

I have therefore come to the conclusion that this Court should not find the trust in the will under consideration in this Court invalid as a charitable trust for the relief of poverty simply on the ground that the public generally is not benefited.

I, therefore, am of the view that the bequest was a valid charitable bequest and would answer Q. 1 "yes".

Question 3 asks:

If either of questions 1 or 2 is answered in the affirmative, what is meant by "Toronto members" of the Eaton Quarter Century Club?

In his affidavit, Mr. Jones, the secretary of the T. Eaton Company Limited, deposes that

The Company carries on business in all ten provinces of Canada through 53 department stores and over three hundred other retail outlets. All employees of the Company become eligible for membership in the Club after 25 years of service with the Company. Employees are frequently transferred from one location to another in Canada and such transfers do occur after an employee becomes a member of the Club.

It is, therefore, a matter of some little difficulty to determine the meaning of the words

d'aussi longtemps, les fiducies relatives aux «parents pauvres» et aux «employés pauvres» sont considérées depuis de nombreuses années comme des œuvres de charité; il y en a maintenant beaucoup de constituées; et présumant, ainsi qu'il se doit, qu'elles sont bien administrées en ce sens que les prestations qui en découlent ne vont qu'aux personnes dont on peut justement dire qu'elles sont, d'après les normes courantes, des «personnes pauvres», aucune objection utile ne peut être soulevée à l'encontre de la reconnaissance de leur caractère d'œuvres de charité. Il me semble donc qu'il faille reconnaître que, quelle que soit son application ailleurs, la règle de l'affaire *Compton* ne peut s'appliquer dans le domaine des fiducies destinées au soulagement de la pauvreté, et la démarcation en ce domaine entre une fiducie de charité et une fiducie privée me semble être celle que la Court of Appeal a tracée dans l'affaire *Re Scarisbrick*.

Je conclus par conséquent qu'il n'y a pas lieu que cette Cour, du seul fait que le public n'est pas avantagé de façon générale, déclare invalide en tant que fiducie de charité destinée au soulagement de la pauvreté la fiducie testamentaire présentement en litige.

Je suis par conséquent d'avis que le legs est un legs de charité valide et je répondrais «oui» à la question nº 1.

La question nº 3 demande:

Si l'une ou l'autre des questions 1 ou 2 reçoit une réponse affirmative, que faut-il entendre par l'expression «membres de Toronto» du Eaton Quarter Century Club?

Dans sa déclaration sous serment, M. Jones, secrétaire de T. Eaton Company Limited, atteste que

[TRADUCTION] La compagnie exerce son activité dans toutes les dix provinces du Canada, dans cinquante-trois magasins à rayons et dans plus de trois cents autres points de vente au détail. Après vingt-cinq ans de service dans la compagnie, tous les employés de la compagnie sont admis comme membres du club. Les employés sont fréquemment transférés d'un établissement à l'autre au Canada, et il arrive que de tels transferts se produisent après qu'un employé est devenu membre.

Il n'est, par conséquent, pas très facile de déterminer le sens de l'expression «membres de

"Toronto members". I am of the opinion that the words must be interpreted in the light of the test as cited by Lord Wilberforce in *McPhail v. Doulton*[15], at p. 456, that the trust is valid if it can be said with certainty that any given individual is or is not a member of a class. The respondents, the executive officers of the T. Eaton Company Limited, submit:

It is submitted that it is not difficult to ascertain the intention of the testator from the wording of the bequest and relevant surrounding circumstances. It is submitted that a Toronto member would be one who is employed by the company in the City of Toronto. *These are the persons with whom the testator would either have worked personally or who would be working in the surroundings with which he was familiar and to which he was attached by his own personal experience.*

(The italics are my own.)

This is the only place where I have found any reference to the testator's previous history. No objection was taken by any other counsel to the statement and it confirms my feeling that the testator was dealing with an organization with which he was very familiar. I am in agreement that the words "Toronto members" should be interpreted in the light of that situation. The testator would mean those members who were employed by the company in Toronto at the time when they became members. If they were members when the testator was a member and when he was still employed by the company, it is almost inevitable that he would have a degree of acquaintance with persons with such seniority in the service of the company. At any rate, he would know the factual situation surrounding the employment of such "Toronto members" and appreciate the possibility of their becoming either "needy or deserving" in the sense which I have attributed to those words. I do not think the testator would have been concerned with whether those who worked in the Toronto store when they became members of the Quarter Century Club lived within the strict environs of

[15] [1971] A.C. 424.

Toronto». Je suis d'avis que cette expression doit être interprétée à la lumière du critère que Lord Wilberforce a cité dans l'affaire *McPhail v. Doulton*[15], à la p. 456, suivant lequel une fiducie est valide lorsqu'on peut affirmer avec certitude qu'un individu donné est ou n'est pas membre d'une catégorie. Les intimés, c'est-à-dire les fonctionnaires supérieurs de T. Eaton Company Limited, soutiennent l'argument suivant:

[TRADUCTION] Nous sommes d'avis qu'il n'est pas difficile d'établir l'intention du testateur en se référant au libellé du legs et aux circonstances entourant ce legs. Nous croyons qu'un membre de Toronto devait être un membre au service de la compagnie dans la ville de Toronto. *Il s'agit de personnes en compagnie desquelles le testateur aurait lui-même travaillé, ou de personnes qui devaient travailler dans des lieux que le testateur connaissait très bien et auxquels il était attaché de par son expérience personnelle.*

(Les italiques sont de moi.)

C'est le seul endroit où j'ai trouvé une mention quelconque sur les antécédents du testateur. Aucun des avocats n'a présenté d'objection à cette déclaration et elle confirme mon impression suivant laquelle le testateur a parlé d'une association qu'il connaissait très bien. Je suis d'accord pour penser que l'expression «membres de Toronto» doit être interprétée à la lumière de cette situation. Le testateur voulait désigner les membres qui étaient au service de la compagnie à Toronto à l'époque où ils sont devenus membres. S'ils étaient membres lorsque le testateur était lui-même membre et encore au service de la compagnie, il est presque inévitable qu'il ait connu quelque peu des personnes ayant une telle ancienneté dans la compagnie. Dans tous les cas, il devait connaître la situation professionnelle réelle de ces «membres de Toronto», et être en mesure d'évaluer leurs risques de devenir ou «nécessiteux ou méritants», suivant l'interprétation que j'ai donnée à ces mots. Je ne pense pas que le testateur était intéressé à savoir si les personnes qui travaillaient dans le magasin de Toronto lorsqu'elles sont devenues membres du Quarter

[15] [1971] A.C. 424.

Toronto or close by. They might well have lived in a suburban area. After their retirement, they might continue to live in that area or in some more salubrious climate. What influenced the testator in his choice of the words "Toronto members" was his thinking of those who had spent twenty-five years working, as he had, for the T. Eaton Company right in Toronto. I would, therefore, so answer Q. 3.

Century Club demeuraient dans les environs proprement dits de Toronto ou tout près. Ces personnes pouvaient très bien habiter une zone suburbaine. Après avoir pris leur retraite, elles pouvaient continuer à vivre dans cette zone ou dans quelque autre région au climat plus sain. C'est en pensant aux membres qui avaient passé vingt-cinq ans, comme lui-même, au service de T. Eaton Company à Toronto même que le testateur a été amené à choisir l'expression «membres de Toronto». Telle sera, par conséquent, ma réponse à la question nº 3.

Question 4 asks:

If either of questions 1 or 2 is answered in the affirmative, is the determination as to who are "needy or deserving" Toronto members of the Eaton Quarter Century Club in the absolute discretion of the executive officers of the T. Eaton Company Limited?

La question nº 4 est la suivante:

[TRADUCTION] Si l'une ou l'autre des questions 1 ou 2 reçoit une réponse affirmative, les fonctionnaires supérieurs de T. Eaton Company Limited ont-ils une entière discrétion pour déterminer quels sont les membres de Toronto «nécessiteux ou méritants» du Eaton Quarter Century Club?

I see no difficulty in answering this question in the affirmative. The discretion, of course, of the executive officers may only be exercised within the limitation set by the testator, *i.e.*, the beneficiary must be needy or deserving and must be a Toronto member as I have answered Q. 3.

Je ne vois aucune difficulté à répondre par l'affirmative à cette question. Le pouvoir discrétionnaire des fonctionnaires supérieurs ne peut, naturellement, être exercé que dans les limites fixées par le testateur, c'est-à-dire que le bénéficiaire doit être nécessiteux ou méritant et doit être un membre de Toronto conformément à ce que j'ai dit en répondant à la question nº 3.

Acting honestly and with *bona fides* within such limitations, I am of the opinion that the executive officers are not subject to control in their choice of beneficiary. I would, therefore, so answer the questions.

Je suis d'avis que les fonctionnaires supérieurs agissant honnêtement et de bonne foi dans de telles limites n'ont pas à être soumis à un contrôle quant à leur choix d'un bénéficiaire. Je répondrais donc en conséquence aux questions posées.

The costs of all parties should be payable out of the estate. I do not think it would be proper to limit them to this fund. The costs of the executor should be payable upon a solicitor-and-client basis.

Les dépens de toutes les parties devront être payés par la succession. Je ne pense pas qu'il serait juste de les limiter à ce fonds. Les dépens de l'exécuteur de la succession seront payables sur une base procureur-client.

Appeal dismissed with costs of all parties payable out of the estate.

Appel rejeté avec dépens de toutes les parties recouvrables de la succession.

Solicitor for the appellants: George T. Walsh, Toronto.

Procureurs des appelants: George T. Walsh, Toronto.

Solicitors for the respondents, Executive Officers of T. Eaton Co. Ltd.: Osler, Hoskin & Harcourt, Toronto.

Procureurs des intimés, Executive Officers of T. Eaton Co. Ltd.: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondent, National Trust Co. Ltd.: Weir & Foulds, Toronto.

Solicitors for the respondent, The Queen Elizabeth Hospital: Mortimer, Clark, Gray, Collinger, Toronto.

Solicitors for the respondents, Harley J. Marshall et al.: Fasken & Calvin, Toronto.

Procureurs de l'intimé, National Trust Co. Ltd.: Weir & Foulds, Toronto.

Procureurs de l'intimé, The Queen Elizabeth Hospital: Mortimer, Clark, Gray, Collinger, Toronto.

Procureurs des intimés, Harley J. Marshall et al.: Fasken & Calvin, Toronto.

ALBERTA SUPREME COURT

[TRIAL DIVISION]

Stevenson L.J.S.C.

Wood and Whitebread v. The Queen in right of Alberta, Public Trustee of Alberta, The Theosophical Society et al.

R. W. Thomson, for executors.

M. I. Strilchuk, for Theosophical Society.

F. A. Day, for Queen in right of Alberta and Attorney General of Alberta.

R. G. Drew, for Public Trustee.

(Edmonton)

5th August 1977. STEVENSON L.J.S.C.:—This is the trial of certain issues directed to be tried as to the validity of a will and the advice and directions to be given consequent upon the interpretation of it.

1. Execution

The will was admitted to probate in common form. The order directed that it be proven in solemn form and that there be a determination as to whether or not the execution was obtained by undue influence.

The solicitor who drafted the will attended on and witnessed its execution. He testified that, while introduced to the testator by a member of the beneficiary organization, he received instructions from the testator privately. He also testified that he discussed a draft with the testator on at least one occasion and that some changes were discussed and made in the completed will just before execution. He testified as to due execution by the testator and both witnesses. His evidence as to execution was not challenged. The will has been duly proven and the executors are entitled to retain the grant already issued.

There was some evidence that the testator intended to change his will and that he said attempts had been made by the organization to "hijack him". Whatever may have been his attitude shortly before his death, there is absolutely no evidence that he was under any kind of influence at the time of execution of the will. Assuming one should be specially vigilant in the light of this other evidence, the testimony of the solicitor who drew and witnessed the will removes any possible suspicion.

2. Interpretation — Unincorporated Society

I now turn to the interpretation of the document. The critical portions read as follows:

"3. I GIVE, DEVISE and BEQUEATH all the rest, residue and remainder of my estate, both real and personal, of what kind soever and wheresoever situate, that shall belong to me or to which I shall be in any way entitled to or over which I have any power of appointment at the time of my death to the Edmonton Lodge of the Theosophical Society in Canada, a non-profit organization formed for religious, literary and educational purposes. This bequest is without restrictions and is subject to the trusts, conditions and stipulations hereinafter mentioned.

"(a) The said estate or portions thereof may, at the discretion of the executors be left in the bank, or in the present securities or invested in any investments authorized by law for trust funds or under the Canada Life Insurance Act with power to vary such investments at the discretion of the executors.

"(b) The sum of SEVENTY-FIVE ($75.00) DOLLARS each month shall be paid to The Theosophical Society at Post Office Bin C, Pasadena, California, in the United States of America. This is

made in the memory of my mother LIZZIE ARTHUR RUSSELL, and this bequest is for a term of ten years.

"(c) The executors in their own absolute discretion after consultation with the executive of the said Society shall have the power to use the income from and/or encroach upon the capital or corpus of my estate if the net income thereof being insufficient or inadequate for the purpose of complying with Section 3(b) and for the religious, literary and educational purposes of the said Edmonton Lodge of The Theosophical Society in Canada".

The Edmonton Lodge of the Theosophical Society in Canada was not, and had never been prior to the testator's death, incorporated. Evidence as to the state of the parent Theosophical Society in Canada (and as to the status of branches or lodges) was given by Mr. Davey, who is the principal officer of that parent society. I am satisfied from his evidence that there has long been an organization known as the Theosophical Society in Canada, functioning under a written constitution. Its members were either members at large or members associated with a branch or lodge. All the members (whether at large or members of a branch or lodge) accepted the objectives which (after the testator's death) were incorporated into letters patent obtained by the parent group when it incorporated under federal law. The objects to which the Edmonton members, at the time the will was made and at the time of the testator's death, subscribed were as follows:

1. To form a nucleus of the universal brotherhood of humanity, without distinction of race, creed, sex, caste or colour.

2. To encourage the study of comparative religion, philosophy and science.

3. To investigate the unexplained laws of nature and the powers latent in man.

4. To aid, support and promote the cause of theosophy, including the publishing of theosophical literature, hiring of public speakers and using the communications media for the promotion of theosophy.

There are also by-laws as to membership and these vary to some extent from the requirements recognized by the local lodge, but nothing hinges on this difference. The Edmonton lodge has been incorporated following the testator's death and its objects embrace only the first three of the objects which I have set out. On the evidence I conclude that the lodge, at all relevant times up to and including the date of the testator's

death, was functioning under the objectives which Mr. Davey expressed to be the objectives of the parent body.

I heard, subject to objection, some evidence as to the intention of the testator and his knowledge of the society's affairs. The evidence was so taken as a matter of convenience.

It is urged that I should admit extrinsic evidence, that of the draftsman, to show intention. Cited to me was *Jones v. T. Eaton Co. Ltd.*, [1973] S.C.R. 635, 35 D.L.R. (3d) 97 at 102. That case establishes only that the court can look at the factual situation where there is an ambiguity. It is trite to say that difficulty is not an ambiguity (see *Higgins v. Dawson*, [1902] A.C. 1 at 10J and I do not find an ambiguity here. There is no ambiguity in relation to the beneficiary. At most that case is authority for the proposition that the testator's knowledge of the nature of the beneficiary might be admitted to establish "the factual situation in which the testator wrote those words", not his intention. *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co.*, [1969] 1 O.R. 469, 3 D.L.R. (3d) 161, and *Re Johnston*, [1968] 1 O.R. 483, 66 D.L.R. (2d) 688, were also referred to me. Again, these are cases where there was an ambiguity. *Feltner v. The Queen* (1972), 27 D.L.R. (3d) 630 (N.S.), is a case to which reference was made, but it allowed evidence to be led showing the existence of a secret trust, and that is an exception to the parol evidence rule well recognized by equity. Nor is there any deficiency in the description of the property which might admit extrinsic evidence, and another authority cited, *Re Creamer*, [1932] 3 W.W.R. 621 (Alta.), stands only for that proposition.

At the threshold of the consideration of the construction of this will is the fact that the gift is to or for the benefit of an unincorporated society. The subsidiary gift of an annuity to the California society is not subject to these considerations because that beneficiary is an incorporated society and there is no restriction on its enjoyment of the funds. A large number of authorities were cited to me. They are largely collected in two recent cases (*Re Lipinski's Will Trusts; Gosschalk v. Levy*, [1976] 1 Ch. 235, [235] [1977] 1 All E.R. 33, and *Re Recher's Will Trusts*; *National Westminster Bank v. National Anti-Vivisection Society*, [1972] Ch. 526, [1971] 3 All E.R. 401), and prior to that had been reviewed in *Leahy v. A.G. New South Wales*, [1959] A.C. 457, [1959] 2 All E.R. 300. Gifts to unincorporated associations may be construed as:

(a) gifts to the members as of the date of the gift;

(b) a gift to members present and future;

(c) a gift to members subject to contractual responsibilities they have entered into; or

(d) as a trust.

The first and second are clearly inapplicable here. There is no intention of giving a benefit to individual members and, indeed, the contrary intention appears from the provisions specifying the purpose for which the moneys are to be used. The third construction is a possibility but ignores the use of the term "trust", the concept of continuity which the will envisages and the reference to purposes which are narrower than those contained in the objects of the society.

The terms used here are quite different from those considered by Oliver J. in *Re Lipinski's Will Trusts*, supra. There the gifts were given to persons who were both trustees and beneficiaries and could be characterized as absolute gifts with superadded directions. Oliver J. expressed the view that a gift could be made as a simple accretion to organizational funds, but that construction cannot apply here where the use of the gift is restricted to purposes narrower than those of the objects of the organization.

In *Re Recher's Will Trusts*, supra, the gift was upon trust for a series of beneficiaries, including an unincorporated society. Brightman J. notes that such legacy is likely to fail for want of a beneficiary or for remoteness. He cites *Leahy v. A.G. New South Wales*, supra, to the effect that there cannot be a trust for a purpose: "For a purpose or object cannot sue, but, if it be charitable, the Attorney-General can sue to enforce it" (at p. 537). He described the purpose in question as being void for want of a beneficiary and treated it as an absolute gift.

In *Leahy* the issue related to gifts to religious orders.. The court pointed out that a gift to a society, simpliciter, is a gift to its members. The drafter of the will in question here clearly did not intend that result. Admittedly the tendency in modern cases is to disregard words relating to a purpose in order to uphold a gift, but I do not think that one can take that step where the testator enunciated and specified some only of the purposes for which the society was organized. The *Leahy* case discusses the decision in *Re Macaulay*; *Macaulay v. O'Donnell*, [1943] Ch. 435. The latter was a decision of the House of Lords which considered, interestingly enough, a gift to a lodge of a theosophical society. In that case the House of Lords pointed out that the gift was in terms a trust, that the members might be numerous in number and that it was a gift of land. They held the gift to be a trust and it failed for uncertainty. It was

held to be a trust notwithstanding the use of the term "absolutely". Only the first of these distinctions is significant here but it appears to me that it is an important one as the text of the will clearly militates against the gift being one to the individual members.

3. Absolute Gift or Trust

It is in the light of these authorities that the gift must be construed. It was argued that the gift was absolute and the engrafted provisions must be ignored. I must confess to resiling from the proposition that because of inelegant draftsmanship the solemnly expressed provisions that follow the apparent gift are to be ignored. Moreover, the engrafted provisions incorporate a purpose. If one ignores the purpose the gift is to the individual members. If one incorporates them there is a unity of intention which can be preserved, namely, that the purposes are to be served. In addition, the expressed memorial gift would fail if we ignored those provisions which are "engrafted". This is not the typical case of an absolute gift coupled with precatory words. In any event, the task of a court in construction is "to give effect to the real intention of the testator, as that is to be gathered from the testamentary instrument as a whole, regardless of any particular words used or of any rule related to them": per Rand J. in *Hayman v. Nicoll*, [1944] S.C.R. 253 at 262, [1944] 3 D.L.R. 551, quoted with approval in *Re Trottier*, [1945] 1 W.W.R. 90 at 92 (Alta.). The provision for the memorial gift is totally inconsistent with an absolute gift, as are the provisions for the trust. They discount the effect of the word "absolutely", to paraphrase Farwell J. in *Re Williams*; *Williams v. All Souls, Hastings (Parochial Church Council)*, [1933] Ch. 244 at 253. I pause to note that it would be possible to construe the gift as a conditional gift: see Waters on Law of Trusts in Canada, p. 78; but that is not the terminology used and ignores the expressed trust provisions and the term "absolutely".

Counsel for the Edmonton lodge cited Waters, Law of Trusts in Canada, p. 101; *Jones v. T. Eaton Co.*, supra; *Leitch v. Texas Gulf*, supra; *Re Johnston*, supra; and counsel for the other interested parties cited Bailey on The Law of Wills, 6th ed. (1967), pp. 209 and 219; *Higgins v. Dawson*, supra, at p. 10; *Re Creamer*, supra; and *Re Macaulay*, supra.

Waters, at p. 101, is discussing the use of precatory language and the court's current unwillingness to find precatory trusts. In determining whether or not a trust is intended, absolute words followed by precatory words will not now readily be interpreted as imposing a trust. However, what we have here

are absolute words followed by express provisions that cannot be described as "merely precatory". They are words apt for a trust and nothing else.

This gift was clearly intended to be for the benefit of an unincorporated organization — at least for certain of its purposes — and I am of the view that it was intended to take effect as a trust and not as an absolute gift.

Reading the instrument as a whole it is intended that this trust be for the "religious, literary and educational purposes of the . . . Lodge". A question arises as to whether or not this requirement restricts, expands or supersedes the expressed objects of the organization. It is my view that it is to be read as a gift for religious, literary and educational purposes consistent, of course, with the objectives of the lodge.

4. The Validity of the Purpose Trust

Having come to the conclusion that it was the intention of the testator to establish a trust for certain purposes, the validity of that gift must now be considered.

A purpose trust, unless it is charitable, fails. The reasons usually cited for the failure of such a trust are as follows: firstly, it violates the rule against perpetuities; secondly, it lacks a beneficiary; thirdly, there is an element of uncertainty or indefiniteness; and fourthly, it may be a delegation of testamentary powers: see Scott on Trusts, 3rd ed. (1967), vol. II, p. 923, s. 123.

As Scott points out, a mere power, where there is no attempt to create a trust, is inevitably upheld, and the fourth ground does not appear to be a sound objection to a purpose trust as there can be nothing more readily classed as a delegation than a power. There is a significant trend in legislation towards finding means of withholding gifts which are neither illegal nor contrary to public policy. A gift for the benefit of the purposes of the Edmonton lodge is neither illegal nor contrary to public policy. No one could, of course, have objected to an inter vivos gift to the lodge.

A charitable trust will be upheld notwithstanding the lack of a beneficiary or the violation of the rule against perpetuities and, by definition, has sufficient certainty for the court to administer it. There are two relevant statutory provisions reflecting legislative interest in sustaining gifts. Those are to be found in The Perpetuities Act, 1972 (Alta.), c. 121, and The Wills Act, R.S.A. 1970, c. 393, and are as follows:

The Perpetuities Act, s. 20(1):

"20. (1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy the trust is valid so long as and to the extent that it is exercised either by the original trustee or his successor, within a period of 21 years, notwithstanding that the disposition creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section."

The Wills Act, s. 32:

"32. (1) Where a testator leaves property in trust or by outright gift for a charitable purpose that is linked conjunctively or disjunctively in the will with a non-charitable purpose, and the non-charitable purpose is void for uncertainty or for any other cause, the charitable trust or gift is valid and operates soley for the benefit of the charitable purpose.

"(2) Where a testator leaves property in trust or by outright gift for a charitable purpose that is linked conjunctively or disjunctively in the will with a non-charitable purpose, and the non-charitable purpose is not void, the trust or gift is valid for both purposes and where the will has not divided the property among the charitable and non-charitable purposes, the trustee or executor shall divide the property among the charitable and non-charitable purposes according to his discretion."

I am of the view that I should first consider s. 20(1) of The Perpetuities Act since it prevents the trust from being "void for uncertainty or for any other cause" by construing it as a power.

Section 20 of The Perpetuities Act does not appear to have been the subject of judicial interpretation although there is a like provision in Ontario [The Perpetuities Act, R.S.O. 1970, c. 343]. The provision appears to be based on the American Law Institute's Restatement of the Law of Trusts and is a legislative recognition of the deficiencies in the existing law. I have already referred to the four usually stated objections to the enforcement of a purpose trust.

The Perpetuities Act does not, in my view, remedy only the perpetuities problem. It could have done this by simply adopting the "wait and see" principle or by imposing an arbitrary perpetuity. It does not do this but instead converts the disposition into a power. It is also clear to me that the absence of a beneficiary to enforce the power is of no significance because those who take if the power is not exercised (here next of kin) are available to ensure execution. Nor does the law recognize the objection of delegation in relation to powers of appointment or discretionary trusts.

It is interesting to note that in *Re Shaw*; *Public Trustee v.* Day, [1957] 1 W.L.R. 729, [1957] 1 All E.R. 745 at 759, affirmed [1958] 1 All E.R. 245n, Harman J., faced with a purpose trust which was within the perpetuity, expressed the wish that he could treat George Bernard Shaw's trust for the creation of a new alphabet as a power, citing the Restatement of the Law of Trusts. Indeed, in that case, by a compromise this result was achieved with the concurrence of all parties.

The legislation appears to me to equate "specific purpose trusts" with other recognized anomalous purpose trusts which have been permitted to operate as powers.

Does this gift come within the remedial section? An obvious difficulty is in the use of the term "specific". Two choices appear to be open: to define the term as being the opposite of "general"; or to define it as "precise or certain". While the former interpretation may be applicable, there is nothing in the section which does away with the recognized requirement that the objects of a power must be certain. A gift in order to be protected by the section must be certain. In the case of a charitable trust the court is able to supply certainty by its scheme making power. No authority was suggested to me which would enable the court to settle a scheme for a power. I am also mindful of the fact that the term "specific" is ordinarily to be found defined as "made definite" or "precise": see, e.g., Words and Phrases, vol. 39A, p. 398. I note in discussing purpose trusts that Scott sees a requirement that it be definite: see Scott on Trusts, vol. 2, p. 937, s. 124.

If this instrument is to be construed as a power, then the executors must be able to decide that a payment is "for the religious, literary and educational purposes of the said Edmonton Lodge of The Theosophical Society in Canada". I have not been referred to any authorities discussing the appropriate criteria for "certainty" in a purpose trust and the relatively few cases in which the law recognizes a purpose trust are the obvious explanation.

The requirement of certainty under a power or a trust is discussed and equated by the House of Lords in *McPhail v. Doulton*, [1971] A.C. 424, [1970] 2 All E.R. 228. This case was applied by the Supreme Court of Canada in *Jones v. T. Eaton Co.*, supra. In both cases the courts were concerned with "certainty" in terms of determining the persons entitled. The House of Lords and the Supreme Court of Canada adopted as a test the following, at p. 456:

". . . the trust is valid if it can be said with certainty that any given individual is or is not a member of the class."

Lord Wilberforce quotes with approval a test found in the Restatement of Trusts, 2d. ed., (1959) s. 122:

". . . the class must not be so indefinite that it cannot be ascertained whether any person falls within it."

Modifying the first-quoted test to relate to "purposes", I do not think it can be said within a certainty that any given use would qualify. I do note that Lord Wilberforce says that difficulty in ascertaining the existence or whereabouts of members of the class could be dealt with on an application for directions.

The difficulty in applying the test is compounded by the apparent conjunctive expression "religious, literary and educational purposes".

It would appear to me that what we have here is a linguistic uncertainty which vitiates the gift as distinct from the difficulty of ascertaining the existence or whereabouts of members of the class which can be appropriately dealt with on an application for directions. As Lord Upjohn says in *Whishaw v. Stephens*, [1970] A.C. 508 at 524, [1968] 3 All E.R. 785 (sub nom. *Re Gulbenkian's Settlement Trusts; Whishaw v. Stephens*):

". . . and perhaps it is the more hallowed principle, the Court of Chancery, which acts in default of trustees, must know with sufficient certainty the objects of the beneficence of the donor so as to execute the trust . . . So if the class is insufficiently defined the donor's intentions must in such cases fail for uncertainty."

In saying there is a linguistic or semantic uncertainty in connection with this portion of the will I might be justified in considering extrinsic evidence, but the most that could be said from it is that the testator knew that one of the activities of the society was the conduct of membership meetings at which theosophy was studied and considered and that goes no way towards defining the society's objects or purposes. Had the

trust been simply "for the society", this difficulty would have been obviated because payment into its funds would be something which the court or the executors could determine with certainty as a compliance with the trust. In saying this, I am mindful of the fact that *McPhail v. Doulton*, supra, at p. 234 settled a long time controversy in equity in favour of a liberal interpretation which posed the question as being whether or not "it can be said with certainty whether any given individual is or is not a member of a class", in preference to the narrower view that the court must be able to determine all possible objects.

I have reached this conclusion with some reluctance in light of the fact that the legislation is remedial and expressed purposes are not in any way contrary to public policy. Moreover, the objection of the perpetuities period is eliminated by the introduction of the "wait and see" principle. Nonetheless, I do not think the court or the executor has any means of judging whether in the law of private trusts an object is "religious, literary and educational". In the law of charitable trusts where the terms "religious" or "educational" are sometimes used the court provides certainty by its scheme making power. This disposition lacks the necessary specification because of the practical impossibility in interpreting "religious, literary and educational" in relation to the various objects of the society.

5. *A Charitable Trust in Whole or in Part*

I now turn to the question of whether or not this is a valid charitable trust.

The gift would have been construed as a gift for the purposes of the society if one stopped at the end of para. 3. I have reached the conclusion that the only proper construction is that the gift is restricted as a trust for "religious, literary and educational" purposes within the objects of the society. While the testator may have been mistaken as to the objects of the society, he restricted the use of the gift to those specific purposes. It seems clear that he did not know the expressed objects of the society in view of the comment as to the purpose of its formation. The operative provisions are, however, "religious, literary and educational purposes".

The test is not what is done by the society but what must or can be done.

Fisher J. in *Re Morton; Yorkshire & Can. Trust Ltd. v. Atherton*, [1941] 3 W.W.R. 513 at 530, 56 B.C.R. 536, [1941] 4 D.L.R. 763, says "religion" or something that is religious in nature is construed as a "charitable" trust; but "the advancement of religion shares with other heads the requirement that the trust

must be for the benefit of the public at large or a sufficiently large section of the public": Waters on Law of Trusts in Canada, p. 489.

The evidence before me shows that the society, and theosophy, is not a religion. Its objects embrace the encouragement of the study of comparative religion. To qualify as a charitable trust, in addition to the necessity of a public benefit, "there must be the intention to *advance* religion in some positive manner": see Hanbury's Modern Equity, 9th ed. (1969), p. 262. In *Berry v. St. Marylebone*, [1958] Ch. 406, [1957] 3 All E.R. 677, the Court of Appeal had to consider whether or not the Theosophical Society was one whose principal objects were charitable as coming within the advancement of religion or education. Lord Romer said that the second object of the society was charitable but expressed some doubts about the third. The court quoted the words of Donovan J. in *United Grand Lodge of Ancient Free and Accepted Masons of England v. Holborn*, [1957] 1 W.L.R. 1080 at 1090, [1957] 3 All E.R. 281:

"To advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief."

The court saw the cause of theosophy as, at best, teaching a doctrine. There was no answer to the question there — and there is none here — What religion does the society advance and how does it advance? I can find no such answer and therefore find that the society's objects do not embrace a recognized charitable purpose trust under the heading of religion.

If the reference to "educational purposes" is to qualify as a valid charitable purpose trust then, as the court in that said case said, the object must be advancement of education in the sense of training the mind. In the context of the first object of the society this requirement could not be met. One may then look at the second object and see if it comes within the requirements of an educational trust. I think one has to read the second object of the society in the light of the third and fourth objects. The testator has singled out educational purposes, and within the objects of the society we must find some which are recognized under the "advancement of education" requirement of a charitable purpose trust. If so, the trust may be upheld under the provisions of The Wills Act.

It seems to me that the study of comparative religion, philosophy and science is prima facie charitable. This question was discussed in *Re Hopkins' Will Trusts; Naish v. Francis Bacon Society Inc.*, [1965] Ch. 669, [1964] 3 All E.R. 46 at 48,

where there was a bequest to the Sir Francis Bacon Society to be "applied towards finding the Bacon-Shakespeare manuscripts and . . . general purposes of the work and propaganda of the society". Wilberforce J. in this case said that education embraces research (and that I take to be study) of educational value and directed towards something which will pass into the store of educational knowledge. That I take to be the intent of the third object of this society.

I can find nothing in the main objects of this society which could be embraced within the expression "literary", nor is it per se a charitable purpose.

I have come to the conclusion therefore that certain of the objects of the society, and in particular the second object, embrace a recognized charitable purpose, namely, "the advancement of education" and that the application of the saving provision in The Wills Act must be considered.

The wording in this section is somewhat similar to the New South Wales legislation which was considered by the Privy Council in *Leahy v. A. G. New South Wales,* supra. The board there says that not all dispositions are saved by the legislation simply because the property might be applied to a charitable use. The board requires reference to an object which is predominantly charitable. A gift for the advancement of education would inevitably be construed as charitable and an educational purpose embracing the encouragement of the study of comparative religion, philosophy and science must be construed as one for the advancement of education.

Applying the section in The Wills Act there is a valid charitable trust for those activities of the society which are properly construed as "the advancement of education". The executors may use the moneys only for purposes which so qualify and are free to apply for advice and directions accordingly.

The Issues Answered

The questions propounded in the order of D.C. McDonald J. are answered as follows:

1. The alleged last will and testament was duly executed.

2. The said Henry Earl Russell, at the time of execution, had testamentary capacity.

3. The execution was not procured by undue influence.

4. Clause 3 of the last will and testament does not create a valid gift to the present members of the Theosophical Society in Canada, Edmonton Lodge.

5. The fact of incorporation of the lodge subsequent to the death of the testator does not render the gift a valid gift to an incorporated society.

6. The bequest is to be construed as a trust of indefinite duration.

7. It is to be construed as a trust for a charitable object, namely, the advancement of education, in the study of comparative religion, philosophy and science.

8. As being a trust for charitable objects of the Edmonton lodge there is no need for a general cy-près application (although there may be need for a specific cy-près application: Waters, op. cit., pp. 430-31).

9. Clause 3(b) provides an annuity and, in the absence of objection by any of the parties, could be satisfied by the provision of a lump sum.

CA020336
Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:

RICHARD LEWIS, DORIS BLOMGREN and LIZA ST. DON,
suing on their own behalf, and on behalf of all
other members of ACTRA B.C. PERFORMERS LOCAL 2

PLAINTIFFS
RESPONDENTS

AND:

THE UNION OF B.C. PERFORMERS, also known as
B.C. Performers Actra Local 2, CATHERINE LOUGH,
PETER PARTRIDGE, SAM SARKAR, SCOTT SWANSON and ALEX TAYLOR

DEFENDANTS
APPELLANTS

AND:

ALLIANCE OF CANADIAN CINEMA TELEVISION AND
RADIO ARTISTS, ACTRA PERFORMERS GUILD, ACTRA B.C.
PERFORMERS, LOCAL 1 AND ACTRA FRATERNAL BENEFIT SOCIETY

DEFENDANTS BY COUNTERCLAIM
RESPONDENTS

Before: The Honourable Mr. Justice Finch
The Honourable Madam Justice Ryan
The Honourable Madam Justice Newbury

R. R. Sugden, Q.C. and P. Lewis	Counsel for the Appellants
R. Davies and S. Dunlop	Counsel for the Respondents
Place and Date of Hearing	Vancouver, British Columbia December 1, 1995
Place and Date of Judgment	Vancouver, British Columbia

January 29, 1996

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Ryan

Concurring Reasons by:
The Honourable Mr. Justice Finch (Page 30, Paragraph 35)

Court of Appeal for British Columbia

Richard Lewis, Doris Blomgren and Liza St. Don, suing on their own behalf and on behalf of all other members of Actra B.C. Performers Local 2

- v. -

The Union of B.C. Performers, also known as B.C. Performers Actra Local 2, Catherine Lough, Peter Partridge, Sam Sarkar, Scott Swanson and Alex Taylor

- and -

Alliance of Canadian Cinema Television and Radio Artists, Actra Performers Guild, Actra B.C. Performers, Local 1 and Actra Fraternal Benefit Society

Reasons for Judgment of the Honourable Madam Justice Newbury

1 Against the backdrop of a larger conflict between the Union of B.C. Performers ("UBCP") and the Actra Performers' Guild, this case raises the narrow question of whether one or more trusts were created under the terms of a standard form Collective Agreement entered into by UBCP with various producers or employers between 1990 and 1994. Each of these agreements (also known as "Production Agreements") generally ran for a term of one year, and was then presumably renewed or replaced with another. Under Article 38 of the standard form, producers agreed to deduct and remit certain amounts, and to "contribute" additional amounts, to UBCP in respect of and based on the earnings of both members and non-members of that union. The funds thus received by UBCP were to be used to provide certain benefits — so-called "Insurance" (actually health and welfare) benefits described in Article 3801,

and "Retirement" benefits described in Article 3802 — for members of the Union.

2 In 1992, UBCP began taking steps to formalize programs for the administration of members' benefits and in 1993 to expand the types of benefits to which contributions and deductions made in respect of the earnings of non-members could be devoted. The plaintiffs are members of UBCP Local 1 and are being indemnified in this action by the Actra Performers' Guild. They allege that the use of the subject funds for purposes other than Insurance and Retirement benefits constitutes a breach of trust. In June, 1994 they sought the following under R. 18A of the Supreme Court Rules:

> 1. A declaration that the payment by producers (the "Contributions") made to the Defendant the Union of B.C. Performers (the "Union") pursuant to Article 38 of the Collective Agreements entered into between producers and the Union (the "Collective Agreements") are held in trust for the purpose of providing separate trust funds for:
>
> (a) health and welfare benefits to the beneficiaries as defined by Article 3801 of the Collective Agreements;
>
> (b) a Group Retirement Savings Plan for the beneficiaries as defined by Article 3802 of the Collective Agreements;
>
> and for no other purpose;
>
> 2. A declaration that:

> (a) the Contributions paid by the producers to the Union pursuant to Article 3801 of the Collective Agreements cannot be used for the purpose of providing any benefit other than health and welfare benefits as defined by Article 3801 of the Collective Agreements; and
>
> (b) the Contributions paid by the producers to the Union pursuant to Article 3802 of the Collective Agreements cannot be used for the purpose of providing any benefit other than a Group Retirement Savings Plan as defined by Article 3802 of the Collective Agreements.

3 The Chambers judge in the court below granted these declarations. Her final order declared that the contributions (which term I will use to include deductions) made to UBCP under Article 38 of the Collective Agreements "are and have always been held in trust" for the "Insurance" and "Retirement" benefit purposes described in Articles 3801 and 3802 thereof respectively, and that the use of such funds for any other purpose is invalid and a breach of trust. The order also directed that an inquiry be held by a Master into all contributions made since November, 1990, when the Union adopted its Constitution and began entering into Collective Agreements with producers.

4 As counsel before us submitted, one must infer from the order that the court found that a trust or trusts came into existence in or around November, 1990. I note, however, that in

her reasons for judgment, the Chambers judge at least implied that no valid trust came into existence until a Trust Deed was entered into by UBCP and six individuals (designated as "Trustees") on August 15, 1992. In this regard, she said this:

> The plaintiffs say that the plain language of Article 3807 of the Production Agreement created two separate trust obligations, funded by two independent sources of funds, the first for health and welfare programs for members under Article 3801, the second for retirement benefits for performers under Article 3802. They read Article 3804 as ensuring that UBCP, as trustee, has the powers needed to design the Insurance Program and the Group Retirement Savings Plan, to decide how a performer may qualify for benefits under them, and to spend the funds for those plans, all as its members may approve.
>
> That interpretation is consistent with Article 15 of the Constitution as amended on April 6, 1992, and the Trust Deed of August 15, 1992. It depends on Trust Deed for its efficacy. It is the Trust Deed that provides for a valid trust to come into existence. That document provides the necessary certainty of intention, subject matter and objects to constitute a trust. Before the creation of the Members Benefit Trust, the use of the funds was controlled by the Production Agreement under which they were paid. Under Article 3804 UBCP retained a very wide discretion over how to use those funds both as to objects and subject matter. It was in the exercise of that discretion that UBCP created the Members Benefit Trust. Indeed it seems that UBCP intended to transfer its discretion over the contributions to the Trustees of the Members Benefit Trust in August 1992 as a means of continuing the programmes it had begun earlier, programmes of which it seems to have been the administrator or manager, not unlike the Union in ***Mohr*** [(1989), 36 E.T.R. 246

> (B.C.S.C.)] rather than a classical trustee. [Emphasis added]

When this discrepancy was noted in the course of argument before us, Mr. Sugden indicated, quite properly, that he was appealing the order, and not the reasons, of the court below. He said he intended to confine his appeal to the narrow declaration that funds paid over by producers to UBCP pursuant to the Collective Agreements are and have been held in trust for the purposes set forth in those Agreements since their inception. It is his position that the Agreements were never intended to create a trust and could not do so because they do not meet the "three certainties" of intention, subject and objects.

5 Mr. Davies for the defendants argued on the other hand that the orders granted by the Chambers judge were correct, that the three certainties were met by the Collective Agreements, and that a "complete" trust or trusts came into existence immediately in 1990. In his analysis, the 1992 Trust Deed was simply an attempt by UBCP to "create machinery for the administration" of the Retirement and Insurance funds or an "exercise of powers" given to the Union in the Collective Agreements.

Chronology

6 A description of the operative provisions of the documents in question, and when they were adopted, is in order.

7 UBCP was founded in late October or early November of 1990 and its Constitution was adopted on November 5 of that year. As noted by the Chambers judge, the Constitution in its original form made no mention of employers' contributions or deductions or of any "trust" until the Constitution was amended in April, 1992. From the early days of the Union, however, the Collective Agreements entered into with producers contained Article 38, of which the relevant provisions were as follows:

> **A3801 Insurance.**
>
> (a) In consideration of the free-lance employment nature of most performers, the Union shall maintain health and welfare programs which provide such benefits to members as life insurance, dental care, accidental death and disability coverage, weekly indemnity benefits, and extended health care.
>
> (b) The design and extent of coverage shall be at the absolute discretion of the Union.
>
> (c) As part of the regular remittances to the Union, the Producer shall contribute insurance premiums in an amount equal to five percent (5%) of the Gross Fees (inclusive of Use Fees) paid to all Performers.

A3802 Retirement.

(a) The Union shall maintain a Group Retirement Savings Plan for performers. This shall be funded through the following contributions:

(i) The Producer shall contribute an amount equal to nine percent (9%) of the Gross Fees (inclusive of Use Fees) paid to all Performers; and

(ii) The Producer shall deduct an amount equal to three percent (3%) of the Gross Fees (inclusive of Use Fees) paid to each Performer.

A3803 Non-Members. The Producer contributions and performer deductions contemplated by this Article apply equally to Union members and non-members, residents and non-residents.

A3804 The Plans. The terms and provisions of the Insurance and Retirement programs designed and maintained by the Union — including qualification for the benefits provided under those programs — shall be at the sole discretion of the Union membership, and funds collected pursuant to this Article may be used in such manner and for such purposes as may be determined in the absolute discretion of the Union.

. . . . .

A3807 Payments made under Articles A3801 and A3802 shall be payable to the Union which shall hold the money on trust for the performers affected to be used for administering its Insurance and Retirement programs. With the contributions and deductions, the Producer shall provide an itemized statement of the amount of each performer's earnings and the contributions and deductions made on his/her behalf. [Emphasis added]

We were advised that when remitting the deductions and contributions referred to in Article 38, producers forwarded cheques payable to the Union "in trust" and that the Union deposited them into a "trust account".

8 On April 6, 1992, the membership adopted a new Article 15 to the Union's Constitution. It stated:

> Article 15 — INSURANCE AND RETIREMENT
>
> (a) For purposes of establishing, administering, promoting and providing services pursuant to Insurance and Retirement plans on behalf of the membership, the Union has the right and authority to require and have Employers make deductions from payments due a member, probationary member, temporary member or work permittee working in the jurisdiction of the Union and to have such deductions and the employer contribution made payable to the Union — In Trust.
>
> (b) The funds collected in accordance with para. (a) above, shall be managed by the Committee of Benefits Trustees. Every member shall have the right to all information available to the Committee regarding his/her own contributions. . .
>
> (c) The Committee shall continue the Union of B.C. Performers' Member Benefits program and the contracts and arrangements for custodial, management, and other services under this Insurance and Group Retirement Savings Plan.
>
> . . . . .

> (f) The Committee shall report to each meeting of the Executive Board and the membership.

A few months later, on August 15, 1992, the Union entered into the so-called Trust Deed (headed "Agreement and Declaration of Trust") with six individuals who were referred to as the "Trustees". It recited that UBCP had made provision in its Constitution for the funding of a "Member Benefits Plan", a copy of which was attached to the document; that the Trustees were appointed as the first trustees of the Plan and would constitute the "Committee of Benefits Trustees"; and that the Union and Trustees wished to "create a trust and establish a fund to be used in the manner set out in this agreement". The operative paragraph was paragraph 4, which provided:

> **4.** The Trustees are hereby empowered, authorized and directed to establish a plan to be known as "The Member Benefit Plan" which shall define the benefits to be provided by the contributions, the conditions of eligibility for such benefits, the terms of payment, and such other items as the Trustees shall deem it necessary to include. The terms of the Plan shall be determined by the Trustees in their sole discretion and the Trustees shall use an actuary or other professional advisors to the extent necessary, and the Plan shall be subject to change by the Trustees, retroactively or otherwise, from time to time, as provided in Section 40 and in the Amendment Section of the Plan and in the Constitution and By-laws of the Union.

Further, paragraphs 20 and 24 provided:

> **20.** Except for contributions designated to be directed to a Registered Retirement Savings Plan as defined by the Income Tax Act, the contributions of the Participating Employers, the Union and/or the performers presently fixed by the Collective Agreement or otherwise and such further contributions as may be fixed by Collective Agreements subsequently negotiated between the Participating Employers and the Union and all contributions, including voluntary performer contributions, made by or on behalf of any beneficiary shall be paid to the Trustees, irrevocably and received by the Trustees in trust and administered by them as herein set forth.
>
> . . . . .
>
> **24.** The administration of the Fund shall be vested wholly in the Trustees and for such administration the Trustees shall, consistent with the purposes of this Agreement, have the power to make arrangements and agreements, including reciprocal arrangements and agreements, with corporations, bodies or persons which the Trustees have determined will meet the purpose of the Fund and provide performers with such benefits as the Trustees in their sole and complete discretion deem most advisable and to terminate, modify and renew such arrangements and agreements, and to exercise and claim all rights and benefits granted to the Trustees by any such arrangement or agreement.

9 In the fall of 1992, disagreements arose between UBCP's Executive Board and the Trustees concerning the administration of the Insurance and Retirement benefits. The Chambers judge found that at the time the Union was seeking various legal opinions concerning the validity of the Trust Deed, it withheld from the

Trustees all contributions received from producers under the Collective Agreements then in force. As she noted, "In effect, UBCP was saying that it retained the discretion to transfer to the Trust only such portion of the contributions as it wished to put beyond its control." The court found that in 1993, UBCP began to treat those contributions received in respect of non-members of the Union as funds that were not subject to the 1992 Deed of Trust but which were available to provide "general benefits" to members. Indeed, the discovery evidence of UBCP's Treasurer and other financial information adduced at the hearing indicate that these contributions were included in the Union's own revenues in its financial statements.

10 The Trustees objected to this development and a series of negotiations between them and the Executive Board followed. Ultimately, it was agreed that UBCP would transfer all Retirement contributions made under Article 3801 of the Collective Agreements in respect of non-members and all Insurance contributions made under Article 3802 to the control of the Committee of Benefits Trustees, that those Trustees would resign, and that UBCP would appoint replacements. A few months later, in September, 1993, the Constitution and Trust Deed were amended. In broad terms, the amendments contemplated that contributions made by producers in respect of the earnings of non-member performers would be directed to a "General Welfare Program" that would "promote and protect the

economic, social and professional interests of members." These purposes were obviously wider than the Insurance and Retirement purposes previously contemplated by the Collective Agreements and by Article 15 of the Constitution as amended in 1992.

11 To formalize the new arrangement, a "General Welfare Trust Deed" was approved by the membership to stand parallel to the Member Benefits Trust Deed of 1992. While the latter would continue to be the administrative vehicle for the Retirement and Insurance programs, the new Trust Deed purported to establish a trust to be funded by so-called "benefit equalization payments" (essentially those contributions made in respect of non-members' earnings), and contemplated benefits such as cab rides home after dark, collateral for hardship loans, and educational and other support for UBCP members.

12 Following some further amendments for tax purposes, Article 38 of the Collective Agreements was amended in April, 1994 to remove all references to "trust". Article 3805 was also augmented by a declaration that "For greater certainty, the equalization payments belong exclusively to the Union." Given these provisions, counsel in the court below agreed, and the Chambers judge accepted, that she was concerned only with the Collective Agreements in force up to the coming into effect of the 1994 amendments.

Intentions and Ambiguity

13 Anyone reading Article 38 quoted at pp. 6-7 above will quickly see that it contains rather problematic language. Articles 3801 and 3802 require the Union to maintain Insurance and Retirement benefit programs respectively, and Article 3807 says that monies paid under those Articles shall be held by the Union "on trust for the performers affected to be used for administering its Insurance and Retirement programs." Yet at the same time, Article 3804 permits funds collected under Article 38 to be used by the Union in its "absolute discretion".

14 In my view, the juxtaposition of these provisions creates an ambiguity or uncertainty (to put it at its mildest) on the face of the document that requires one to consider evidence of the "factual matrix" or objective facts known to the parties at or before the date they entered into the Collective Agreements: see ***Prenn v. Simmonds***, [1971] 3 All E.R. 237 (H.L.) at 240-1; ***Cominco Ltd. v. C.P. Ltd.*** (1988), 24 B.C.L.R. (2d) 124 (B.C.S.C.); ***Qualico Devs. Ltd. v. Calgary (City)***, [1987] 5 W.W.R. 361 (Alta.Q.B.) at 369-373. In Canada, evidence of the subsequent conduct of parties, including "acts of performance," may also be admitted to explain an ambiguity although courts have warned that such evidence will carry little weight unless it is "unequivocal": see ***Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co.***, [1968] 3 D.l.R. (3d) 161 (Ont. H.C.) at 238; ***Qualico Devs. Ltd.***,

supra, at 372. As noted by Lambert J.A. in ***C.N.R. v. C.P. Ltd.***, [1979] 1 W.W.R. 358:

> However, to say that these types of evidence become admissible where two reasonable interpretations exist is not to say that the evidence, if tendered, must be given weight. In the case of evidence of subsequent conduct, the evidence is likely to be most cogent where the parties to the agreement are individuals, the acts considered are the acts of both parties, the acts can relate only to the agreement, the acts are intentional and the acts are consistent only with one of the alternative interpretations . . . In no case is it necessary that weight be given to evidence of subsequent conduct. In some cases it may be most misleading to do so, and it is to this danger that allusions are made throughout the recent English cases. . . . [at 372-3; emphasis added]

15 I suspect this is what the Chambers judge had in mind when she said she had difficulty in understanding why the Collective Agreements "should be interpreted having regard to changes the members have made to the Constitution and to the Production Agreement since the difference of opinion arose among the members about the use to which payments made on behalf of non-members should be put." The establishment of the General Welfare Trust in 1993, for example, is not unequivocal — it might be taken as evidence of the parties' intention that UBCP was to have the power to expand, beyond "Retirement" and "Insurance", the uses to which the producers' contributions could be put; or it might be evidence of an attempt by UBCP to establish a particular position

in the course of negotiations with the plaintiffs, regardless of the parties' original intentions. In any event, it can hardly be taken as evidence of the intentions of the producers since they were not party to any of the subsequent documents prepared by the Union. Conversely, evidence that the producers made their cheques payable to UBCP "in trust" might indicate their intentions, but by itself (i.e., without the accompanying evidence that the Union deposited the cheques to a "trust" account) tells one little about the intentions of UBCP, the other party to the Collective Agreements.

16 Mr. Sugden on behalf of UBCP submitted that the Collective Agreements should not be viewed in isolation and that considered together with UBCP's Constitution and the trust deeds and benefit plans enacted in 1992 and 1993, the Collective Agreements are simply part of the Union's "administrative apparatus". He relied strongly on the decision of Taylor J. (as he then was) in ***Re Trustees of Local 213, Electrical Workers Welfare and Pension Plans; Re Rhodes*** (1981), 27 B.C.L.R. 369, which was followed in ***Boe v. Hamilton*** (1 June 1988), Vancouver C864925 (B.C.S.C.) and ***Service Employees International Union, Local 24 v. Henry*** (12 March 1991), Vancouver A910283 (B.C.S.C.). In ***Rhodes***, the petitioner had been prevented by his union local from acting as a trustee of its welfare and pension plans because he had been suspended by a union disciplinary tribunal from participating in the affairs of the local. The union

opposed his petition, not on the ground that no trust existed, but on the ground that the trustees of the plan were responsible to the local, and that Mr. Rhodes was by the terms of the international union required to exhaust all internal appeal procedures before seeking redress in a court of law.

17 As I read his judgment, Taylor J. accepted that the trust deed should not be viewed in isolation apart from the bylaws of the local and the international union's constitution. All three documents by their terms supported the conclusion that the welfare and pension plans were subject to the overall authority of the international union acting through the local's officers, and that the trustees of the plans were intended to act as representatives of the union rather than as "independent" bodies. In the words of Taylor J. at 375-376:

> The question which must, I think, be decisive of all three issues is whether the trust created by the deed of 28th April 1969 is to be considered part of the administrative apparatus of the local or discharges functions outside the responsibility of the local as part of the union.
>
> The use of such expressions as "trust" and "trustee" cannot, I think, assist in answering this critical question by introducing a suggestion of independence or autonomy unless that suggestion is supported in the contractual arrangements themselves. The fact that people occupy the position of trustees does not make them necessarily independent, as opposed to being the agents, delegates or representatives of others. The trustees under

> the deed here in question hold funds for which the local has bargained and for which, I conclude, the local must bear responsibility within the union organization. The facts that only some of the members of the local are to benefit from these funds and that some persons not members of the local also are to benefit from them do not seem to me to change the status of the funds as funds of the local, generated by it through its agreements with employers and for which the local has responsibility on behalf of the union. . . .
>
> Although the matter is by no means free from complexities, I have concluded that trustees must be regarded as persons carrying out duties of the local itself and thus as officers of the local, albeit officers elected by one class only of its members. They carry out duties as specified by the executive of the local and accepted by the initial trustees, subject to variation by agreement between the local executive and the trustees.
>
> It follows that the dispute which has resulted in these proceedings is an internal union matter, concerning which the petitioner may be bound by the constitution to pursue internal appeal procedures.

18 This result was affirmed by the Court of Appeal at (1982) 36 B.C.L.R. 233. Again, the issue was not whether a trust existed, but "whether or not it was unlawful for the union, through the chairman of the trustees, to say that [Mr. Rhodes] should not be allowed to participate in the affairs of the local as a trustee." The Court noted that it was difficult to say whether Taylor J. had dealt with the question before him as an exercise of discretion; in any event, the Court of Appeal felt itself "able to exercise a discretion on the question of granting or refusing to grant a

declaratory judgment in the circumstances." After setting out the declaratory judgment sought by the petitioner, Macfarlane J.A. for the Court concluded as follows:

> The nature of those declarations is such as to require, in my opinion, a very careful examination of all the circumstances before the court should exercise a discretion to make them.
>
> Having regard to the other pending proceedings in the Supreme Court, to the New Jersey proceedings, to the nature of the declarations now sought here, and to the doubtful invocation of the provisions of the Trustee Act and of the Rules of the Supreme Court on which the appellant relies, this is not a case, in my opinion, in which the discretion of the court ought to be exercised in favour of this appellant in the circumstances I have tried to describe. [at 237]

19 Mr. Sugden seemed to take much more from ***Re Rhodes*** than is justified, in my view. In his submission, the case constitutes a "paradigm" of the correct approach to the interpretation of agreements involving labour unions and, he at least implied, indicates that such documents should generally be regarded as part of the internal workings of a union intended to provide a vehicle for the collection of union funds — nothing more. But if by this he meant that an agreement between a union and an employer that creates a valid trust should, because it involves a union, not be enforced in the same way it would be enforced if entered into by private persons, or that the beneficiaries of such a trust are not entitled to the same rights as any other beneficiaries, I do not

agree. It would take much clearer authority, in my opinion, for a court to put to one side the normal rules of Equity and to disregard trust obligations — if such are found to exist. The decision of at least the lower court in ***Rhodes***, moreover, was based on the construction of particular documents whose terms are very different from those at issue here. Even given the wide discretion possessed by the union in ***Rhodes*** to influence the trustees, a trust seems still to have been assumed by all parties and by both courts.

20 ***Rhodes*** does illustrate, however, the principle referred to earlier, that when asked to construe an agreement, a Court may properly consider its objective "genesis", and that other documents entered into at the same time may well be relevant in this regard. In the case at bar, Article A103 of the Collective Agreements, an "entire agreement" clause, may restrict this enquiry; but even apart from that provision, reference to other documents extant prior to the events of 1992 and 1993 provides little, if any, assistance. As noted above, UBCP's original Constitution made no reference to employee benefit contributions or to any "trust". Article 14 allowed the Constitution to be amended by a two-thirds vote of members, but made no reference to the amendment of any other document. I have already dealt with the weight to be given to the later amendments to these documents and to the 1993 General Welfare Trust Deed as an aid in construing Article 38 of the Collective Agreements.

The Collective Agreements

21 I turn then to the Collective Agreements themselves. It is of course trite law that for a valid trust to come into existence, the three certainties — certainty of intention, objects and subject matter — must be met, subject only to one class of exceptions not relevant here. If the first requirement is not met — i.e., a transfer of property is construed as not intended to have been subject to a trust obligation — the transferee takes the property beneficially: see Hanbury and Martin, ***Modern Equity***, 14th ed. (1993) at 97; Waters, ***The Law of Trusts in Canada***, 2nd ed. (1984) at 110-1. If the first test is met but the intended trust fails due to uncertainty of subject matter or objects, then as Mr. Davies pointed out, the property is held on a resulting trust in favour of the settlor — in this case, presumably, the producers.

22 It is the questions of certainty of intention and certainty of objects that are of concern in this case. (No argument was raised concerning certainty of subject-matter, and rightly so in my view.) Dealing first with intention, the document in question must evince an enforceable duty or obligation — that is the essence of trust. In this regard, Professor Waters, *supra*, states:

> As Lord Langdale M.R. remarked in ***Knight v. Knight***, in words adopted by Barker J. in ***Renehan v. Malone***

> and considered fundamental in common law Canada, first, the language of the alleged settlor must be imperative; . . . This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely , but he is merely put under a moral obligation as to what is to be done with the property. [at 107; emphasis added]

23 Can it be said that Article 38 of the Collective Agreements shows an intention to impose an imperative duty or trust with respect to funds collected from producers? The use of the word "trust" in Article 3807 goes some way to suggest that a trust or trusts were intended, especially when one considers that the Collective Agreements are fairly sophisticated documents likely drawn by a lawyer. On the other hand, as Dr. Waters notes (*supra*, at 109), the words "trust" and "trustee" are neither conclusive nor indispensable. There is also mandatory wording in Articles 3801, 3802 and 3807 that imposes obligations on the Union to maintain Insurance programs for members, to maintain Retirement savings plans for performers, and to hold money received by it in trust for the administration of such programs. These do not sit comfortably with the statement in Article 3804 that funds collected under Article 38 "may be used in such manner and for such purposes as may be determined in the absolute discretion of the Union."

24 Mr. Sugden argued that a trust that allows a trustee to use trust property in his or her sole discretion is void, citing ***Blausten v. Inland Revenue Commissioners***, [1972] Ch. 256 (C.A.) and ***Re Pugh's Will Trusts***, [1967] 1 W.L.R. 1262 (Ch.Div.). ***Blausten*** involved a technical question of construction of a power of appointment. The English Court of Appeal *per* Buckley L.J. reviewed various cases involving wide classes of beneficiaries and the necessity for the settlor of a trust or a power to "set metes and bounds" to the beneficial interests he or she intends to create. ***Pugh's Will Trusts*** involved a testator who directed his executor to dispose of the residue of his estate "in accordance with any letters or memoranda I may leave with this my will and otherwise in such manner as he may in his absolute discretion think fit." No letters or memoranda were found and it was held that the residuary estate was held on trust for undefined objects and was therefore void for uncertainty.

25 Neither case provides direct authority for the proposition that the conferring of "absolute discretion" on a trustee will always negative the inference of an intention to create a trust. They do call to mind, however, a line of cases to the effect that an absolute gift followed by precatory words that the recipient use the gift for a given purpose, will usually not give rise to a trust unless evidence of a contrary intention appears: see Hanbury, *supra*, at 95-97. The instant case is more difficult, in that we are not concerned with mere precatory

wording, and the general tenor of Article 38, apart from Article 3804, suggests to me that trust obligations were intended — an inference consistent with the form of the producers' cheques and the use of a "trust" account or accounts by the Union, for what that evidence is worth.

26 The appellants contended in their factum that the producers had "absolutely no interest in settling a trust or imposing either a trust or other conditions over the funds." This statement is taken from an affidavit of Mr. Taylor, a member of UBCP's Executive Board and its Treasurer. With respect, I doubt that Mr. Taylor should properly have been commenting on the subjective intentions of the producers or that evidence of such subjective intentions was even admissible: see ***Prenn v. Simmonds***, *supra*, at 240-1. Common sense suggests that it is unlikely the producers were intending to make a gift or other beneficial transfer of funds to the Union itself. Rather, the producers had negotiated a collective agreement with the Union providing for performers' benefits and bound themselves to make the contributions referred to in Article 38 as a means of securing the services of performers. Presumably the producers regarded it as in their own interests to "contribute" to their employees' long-term health and retirement prospects, and to that extent did have an interest in seeing that the funds were used for those purposes.

27 Given that a court must strive to give effect if possible to all the words used by the parties to an agreement, how then can the "absolute discretion" referred to in Article 3804 be reconciled with the balance of Article 38? It seems to me that Article 3804 must be interpreted as intended to give the Union membership as wide a discretion as possible in deciding the exact terms and conditions of the Insurance and Retirement programs the Union was required to maintain, but not as taking away from the essential intention to create trust obligations that flows from the balance of Article 38. Interpreted in this manner, Article 3804 confers very broad powers but is not repugnant to the trust duties that may be reasonably inferred from Article 38. On balance, then, I would conclude that the Collective Agreements do show an intention on the part of both parties to create two discretionary trusts — one to provide "Insurance" benefits for "members" and a second to provide "Retirement" benefits for "performers".

28 I am reinforced in this conclusion by a reading of ***Mohr v.C.J.A.*** (1989), 36 E.T.R. 246 (B.C.S.C.), which was affirmed by this Court at (1991), 40 E.T.R. 12. The courts in that case relied on several factors that indicated that an agreement between an employers' association and a union creating a fund for an apprenticeship program had not been intended to create a trust. These included the fact that the agreement could by its express terms be amended or even cancelled without consulting the would-be

beneficiaries, the fact that funds contributed for the apprenticeship program could be co-mingled with those of the "joint board" administering it, and the fact that the program could be revoked and the funds returned to the contributing employers at any time. None of these factors applies in the case before us.

Certainty of Objects

29 The question of certainty of objects is slightly less difficult. The modern test on this branch is whether one can determine whether or not a given person is a member of the class of possible beneficiaries: see ***McPhail v. Doulton***, [1971] A.C. 424 (H.L.) at 456; ***Jones v. The T. Eaton Co. Ltd.*** (1973), 35 D.L.R. (3d) 97 (S.C.C.) at 108; and Waters, *supra*, at 122-127.

30 Article 3801 requires the Union to maintain Insurance programs that provide benefits to "members". The term "members" appears to be used throughout the Collective Agreements as referring to members of UBCP, and no argument was made before us to the contrary. The Agreements do not specify when exactly the term is to be applied — whether, for example, a person who was a "member" in 1991 but thereafter ceased to be so, would nevertheless continue to be a potential beneficiary. It would be overly technical, however, to insist on more detailed wording, especially since we are here construing standard form agreements that were in

force for one year and were then replaced by others. In my view, the tenor of the document as a whole, and the fact that producers were bound to make their contributions and remittances in respect of the fees paid to any member who provided services at any time in the year, lead to the conclusion that the term refers to all persons who were members of the Union at any time in the year in which the particular Collective Agreement in question was in force. It is from among those persons that the "Union membership" may choose, by laying down rules for qualification under Article 3804, which members are to receive Insurance benefits, and on what terms.

31 Similar reasoning applies with respect to the Retirement benefits that are to be provided under Article 3802 to "performers". The term "performer" is not defined in the Agreements, but seems to be used interchangeably with "Performer", which is defined by Article 2 to mean "a person who is engaged to appear on-camera or whose voice is heard off-camera in any manner whatsoever", subject to certain exceptions not relevant here. It is also clear from the Agreements that the term includes both members and non-members of the Union, a conclusion reinforced by Article 3803. The class of potential beneficiaries of this trust, then, is a larger one than that created by Article 3801.

32 I have considered as well Article 3807, which states that payments made under Articles 3801 and 3802 shall be payable "to the

Union which shall hold the money on trust for the performers affected to be used for administering its Insurance and Retirement programs." I would have been concerned had this referred to "members affected", but "performers" is of course the wider class of which "members" is a subset. The phrase is therefore in my view intended as something of a shorthand to refer either to "members" or to "performers", as the case may be, depending on whether one is referring to the trust for Insurance or the trust for Retirement benefits.

33 I conclude, then, that the three certainties are met and that the Collective Agreements did create valid trusts from 1990 onwards — one under Article 3801 for the benefit of members of the Union, and one under Article 3802 for the benefit of performers. Article 3804 conferred on the Union membership the authority to decide the terms and conditions of the programs under which those benefits were to be provided, including qualifications. As counsel implicitly acknowledged, however, the Agreements did not empower the membership or the Union (as trustee of the trusts) to substitute General Welfare benefits for Insurance and Retirement benefits or to otherwise amend the terms of the trusts. Without the consent of all beneficiaries of the trusts in question, even the parties to the Collective Agreements may not affect their rights: as noted by Waters, *supra*, this is the essence of the difference between contract and trust:

> Here is the heart of the matter; 'a dividing line' is drawn between trust and such a contract. . . .
>
> . . . The point has been made that, if A and B can vary their contract without the consent of C, then there is clearly no intention to create a trust. And this was echoed by Disbery J. in the ***Tobin Tractor*** decision when he quoted Cheshire and Fifoot's ***Law of Contract***:
>
> > A trust, once it is constituted, is irrevocable without the beneficiary's consent; a contract may be altered or discharged by the agreement of the contracting parties irrespective of the wishes of the beneficiary!
>
> This is a distinction of crucial significance, and it arises from the fact that contract is obligation, while trust is transfer. The terms of a contract are binding on the parties to it, and cannot be unilaterally varied, but the parties may agree at any time to vary those terms, even after the contract has taken effect. He who is not a party to that contract, even if he is to be the beneficiary of the promisee's performance, cannot object. Once the trust instrument or declaration of trust has taken effect, and the property is vested in the trustee, however, alienation on the terms of that trust has taken place. Therefore no variation can be made by the settlor, or the settlor and the trustee, without the consent of the beneficiary, who now has the right of enjoyment in the trust property. [at 52]

34 Accordingly, I would conclude that the Chambers judge was correct in granting a declaration that the use of contributions made by producers under the Collective Agreements from and after November, 1990 for "General Welfare" benefits was unauthorized and

in breach of each of the trusts. The appeal should be dismissed with costs to the respondents.

"The Honourable Madam Justice Newbury"

I AGREE: "The Honourable Madam Justice Ryan"

Reasons for Judgment of the Honourable Mr. Justice Finch

35 I have had the advantage of reading in draft form the reasons for judgment of Madam Justice Newbury. I agree with the disposition of the appeal which she proposes and I agree in general with her reasons for reaching that conclusion.

36 The issue which has caused me anxious concern is whether there was sufficient certainty of objects expressed in Articles 3801 and 3802 to meet the legal standard for creation of a trust. I am persuaded that the definition proposed in para. 30 of Newbury J.A.'s reasons for "member" is correct. That definition excludes anyone who was not a member of the Union in the period between 5 November 1990 and 15 August 1992. Those charged with the administration of the trust have clear criteria by which to judge whether any individual is, or is not, within the class of persons intended to be benefitted. I have been unable to articulate any other definition which accords with the language of Article 38, and which would be administratively workable or practical.

37 I do not consider that the language of Article 3804 renders the proposed definition of "member" uncertain. Article 3804 gives the Union a broad discretion to decide who may qualify for benefits under the trust, but that discretion is limited to

benefitting only those persons who were members during the currency of the respective Collective Agreements.

38 So far as the trust created by Article 3802 is concerned, I am similarly satisfied that the meaning of "performer" is sufficiently certain. It must include only those "Performers", (as defined in the Collective Agreement) whether members or not, on whose behalf contributions or deductions were made by producers during the currency of the respective Collective Agreements. That is in accord with the intention of the settlor, as determined objectively on the language of the Collective Agreement, and it provides clear guidelines for those charged with the administration of the trust. Again, I have been unable to articulate any other definition which accords with the language of Article 38 and which would be administratively workable or practical.

39 For the reasons indicated above, I do not consider that the language of Article 3804 detracts from the certainty to be found in this meaning of "performer".

40 As I understand the reasons of the learned chambers judge, she considered that the creation of these two trusts depended upon the trust deed of 15 August 1992. She said:

> That document provides the necessary certainty of intention, subject matter and objects to constitute a trust.

41 If that is a correct understanding of her reasons, then I would respectfully disagree. However, as Madam Justice Newbury has pointed out, the appeal is from her order, the terms of which are set out in para. 2 of Newbury J.A.'s reasons. In my respectful view the order was properly granted.

42 For these additional reasons I would dismiss the appeal.

"The Honourable Mr. Justice Finch"

S/M/49/13

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

Citation: McCorkill v. Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased – 2014 NBQB 148
Date : 2014 06 05

BETWEEN: **ISABELLE ROSE MCCORKILL**

Applicant

- and -

FRED GENE STREED, EXECUTOR OF THE ESTATE OF HARRY ROBERT MCCORKILL (AKA MCCORKELL), DECEASED

Respondent

-and-

THE PROVINCE OF NEW BRUNSWICK as represented by THE ATTORNEY GENERAL, THE CENTER FOR ISRAEL AND JEWISH AFFAIRS, LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA, and THE CANADIAN ASSOCIATION FOR FREE EXPRESSION

Interveners

BEFORE:	Justice William T. Grant
HEARING HELD:	Saint John
DATES OF HEARING:	January 27-28, 2014
DATE OF DECISION:	June 5, 2014

COUNSEL:

Marc-Antoine Chiasson for the Applicant

John D. Hughes for the Respondent

Richard A. Williams for the Intervener, Province of New Brunswick as represented by the Attorney-General

Danys R.X. Delaquis for the Intervener, The Centre for Israel and Jewish Affairs

Catherine A. Fawcett for the Intervener, League for Human Rights of B'Nai Brith Canada

Andy Lodge for the Intervener, The Canadian Association for Free Expression

DECISION

GRANT, J

[1] Harry Robert McCorkill died on February 20, 2004 having first made his last will and testament dated April 19, 2000. He named William Luther Pierce of Post Office Box 70, Hillsboro, West Virginia as his sole executor and the respondent, Fred Gene Streed ("Streed"), of the same address as his alternate executor. Mr. Pierce predeceased Mr. McCorkill so Streed became the executor and trustee.

[2] In the dispositive clause of his will he transferred all of his property to his trustee in trust to pay all his debts and taxes and to "…pay or transfer the residue of my estate… to the NATIONAL ALLIANCE, a Virginia corporation, with principal offices at Post Office Box 70, Hillsboro, West Virginia 24946, United States of America", the same address he used for both his executor and his alternate executor.

[3] On November 30, 2010, Streed applied for Letters Probate of the McCorkill Will showing a probate value of approximately $128,500 Canadian and $90,000 US, all of which was personal property. On May 6, 2013, Letters Probate were issued to Streed.

[4] Mr. McCorkill was never married and had no children. He had two siblings, a brother and a sister, both of whom survived him though he was not close to them.

[5] On July 18, 2013 his sister, Isabelle Rose McCorkill, filed an application with this court which was amended on August 29, 2013. In her amended application, Ms. McCorkill requests, *inter alia*, an order:

> **a. Declaring that the bequest provided at paragraph 3(b) of the Last Will and Testament of Harry Robert McCorkill (a.k.a. McCorkell) void as it is a bequest that is illegal and/or contrary to public policy;**

[6] On July 22, 2013, Ms. McCorkill was granted an *ex parte* injunction enjoining Streed as executor of the estate from paying, transferring or dispersing any portion of the estate and ordering that all the assets of the estate remain in the province of New Brunswick until further order of the Court.

[7] On July 31, 2013, after a hearing with notice to the respondent, that order was continued pending the disposition of this application on its merits.

[8] On August 19, 2013, the Province of New Brunswick ("the Province"), The Centre for Israel and Jewish Affairs ("the CIJA") and The League for Human Rights of B'Nai Brith Canada ("B'Nai Brith") were given leave to intervene in this application.

[9] On September 3, 2013, the Canadian Association for Free Expression ("CAFE") was also added as an intervenor.

APPLICANT'S GROUNDS

[10] In her amended Notice of Application, Ms. McCorkill sets out the following as the grounds of her application:

> **g. The payment or transfer of the residue of the estate to the National Alliance is against public policy and in contradiction with Canada's own laws, undertakings and commitments in that:**
>
> **i. The National Alliance is a long-standing neo-Nazi group in the United States that has also been active in Canada. Through its hate propaganda, the National Alliance promotes a**

political program parallel to that of the original World War II-era National Socialist Party of Germany (the Nazis) including genocide, ethnic cleansing, and the use of hate motivated violence and terror to achieve its aims.

ii. The National Alliance has a long history of inspiring and carrying out hate motivated violence and terror through its members and supporters in order to achieve its stated political aims;

iii. The *Criminal Code* of Canada specifically prohibits hate propaganda in Canada and make criminal offences of advocating genocide and publicly inciting hatred;

iv. Canada has been a signatory and party to the *International Convention on the Elimination of All Forms of Racial Discrimination* ("Convention") since 1970. Parties to the Convention shall condemn all hate propaganda and declare as offences hate propaganda, membership in racial supremacist groups and the provision of any assistance to racist activities, including the financing thereof;

v. Canada has also signed on, and committed to, other international declarations and covenants which specifically protect individuals against any discrimination, advocacy of national, racial or religious hatred and incitement to discrimination and violence; ...

ISSUES

[11] This application raises the following issues:

A) Are the writings and other communications of the residual beneficiary of the estate, The National Alliance, (hereinafter sometimes referred to as "the NA") illegal and/or in violation of public policy?

B) If so, should the court declare the bequest invalid, given that it is made to a beneficiary whose activities are contrary to public policy but not made for specific purposes?

A. THE NA'S COMMUNICATIONS AND ACTIVITIES

[12] There is an extensive body of evidence dealing with both the communications and the activities of the National Alliance which has been filed by the parties and the interveners in this application which I will summarize in the following paragraphs.

Isobel McCorkill - Applicant

[13] In support of her application, Ms. McCorkill has sworn two affidavits and filed three sworn by Mark Potok, a senior fellow at the Southern Poverty Law Center ("the SPLC"), which is a non-profit civil rights organization in the United States. Portions of two of Mr. Potok's affidavits were ruled inadmissible. Ms. McCorkill makes no allegations in her affidavits about the National Alliance.

[14] In his third affidavit sworn November 20, 2013, Mr. Potok, states:

> **I have performed extensive research and have published several articles and chapters on right-wing extremist hate groups, including the National Alliance (NA). As I also explained, the SPLC has gathered numerous documents concerning the National Alliance through publicly available sources or subscriptions to NA publications.**

[15] Mr. Potok also attaches four exhibits to his affidavit concerning the NA. The first is a document entitled "What is the National Alliance?" which is prepared by the NA and sets out its ideology and program. Under the heading "Summary of Statement of Belief" is found the following:

> **We may summarize in the following statement the ideology outlined above:**

We see ourselves as a part of Nature, subject to Nature's law. We recognize the inequalities which arise as natural consequences of the evolutionary process and which are essential to progress in every sphere of life. We accept our responsibilities as Aryan men and women to strive for the advancement of our race in the service of Life, and to be the fittest instruments for that purpose that we can be.

[16] Under the heading "White Living Space" the document states:

... After the sickness of "multiculturalism," which is destroying America, Britain, and every other Aryan nation in which it is being promoted, has been swept away, we must again have a racially clean area of the earth for the further development of our people. We must have White schools, White residential neighborhoods and recreational areas, White workplaces, White farms and countryside. We must have no non-Whites in our living space, and we must have open space around us for expansion.

We will do whatever is necessary to achieve this White living space and to keep it White. We will not be deterred by the difficulty or temporary unpleasantness involved, because we realize that it is absolutely necessary for our racial survival. ...

...

[17] Under the heading "An Aryan Society" it states:

We must have new societies throughout the White world which are based on Aryan values and are compatible with the Aryan nature. We do not need to homogenize the White world: there will be room for Germanic societies, Celtic societies, Slavic societies, Baltic societies, and so on, each with its own roots, traditions, and language. What we must have, however, is a thorough rooting out of Semitic and other non-Aryan values and customs everywhere. ...

In specific terms, this means a society in which young men and women gather to revel with polkas or waltzes, reels or jigs or any other White dances, but never to undulate or jerk to negroid jazz or rock rhythms. ...

[18] On the topic of "A Responsible Government" the document states:

> **… The fact is that we need a strong, centralized government spanning several continents to coordinate many important tasks during the first few decades of a White world: the racial cleansing of the land, the rooting out of racially destructive institutions, and the reorganization of society on a new basis.**
>
> **The central task of a new government will be to reverse the racially devolutionary course of the last few millennia and keep it reversed: a long-term eugenics program involving at least the entire populations of Europe and America. Such a task is necessarily intrusive, and it will require large-scale organization.**

[19] The Merriam-Webster online dictionary defines the term "eugenics" as " a science that tries to improve the human race by controlling which people become parents". It continues:

> **The first thorough exposition of eugenics was made by FRANCIS GALTON, who in *Hereditary Genius* (1869) proposed that a system of arranged marriages between men of distinction and women of wealth would eventually produce a gifted race. The American Eugenics Society, founded in 1926, supported Galton's theories. U.S. eugenicists also supported restriction on immigration from nations with "inferior" stock, such as Italy, Greece, and countries of eastern Europe, and argued for the sterilization of insane, retarded, and epileptic citizens. Sterilization laws were passed in more than half the states, and isolated instances of involuntary sterilization continued into the 1970's. The assumptions of eugenicists came under sharp criticism beginning in the 1930's and were discredited after the German Nazis used eugenics to support the extermination of Jews, blacks, and homosexuals. …**

[20] Under the heading "Program of the National Alliance" the document discusses one of its goals as "the attainment of governmental power". In explaining this, it states:

> **By governmental power we mean, of course, the power to make and execute all governmental policy. This implies a massive replacement of the existing power structures: legislatures, courts, military and police command cadres, and the mass media.**
>
> **No mere election of a head of state can give us this power; no president or prime minister, even if he is installed by a military coup and has the backing of the top military leaders, can stand alone against the other elements of the power structure in a modern White state – especially not against the power of the mass media. In order for any power we acquire to be meaningful it must be total: that is, it must include all the major elements of the power structure.**

[21] Later, in explaining why it is not necessary to build a larger power structure than the one it seeks to replace the document states:

> **The second reason why we don't have to build a power structure as large as the one opposed to us is that all the elements in the population we want to reach with our message are becoming increasingly responsive to that message. At the same time the opposed power structure is losing its own partisans. The government and the Jewish media will continue to have their hard core of support – Jews, feminists, some homosexuals, some Christians, the radical-liberal New World Order enthusiasts, most of the state and Federal bureaucrats, and others on government or media payrolls – but outside these special constituencies our enemies have very few real friends left, even among their beneficiaries. Blacks and mestizos as a whole, for example, can hardly be considered a staunch bulwark of the government, despite the favoritism it has shown them.**

[22] Under the heading "Requirements for Membership" the document states:

> **Eligibility: Any White person (a non-Jewish person of wholly European ancestry) of good character and at least 18 years of age who accepts as his own the goals of the National Alliance and who is willing to support the program described herein may apply for membership.**
>
> **Ineligible persons: No homosexual or bisexual person, no person actively addicted to alcohol or to an illegal drug, no person with a non-White spouse or a non-White dependent, (sic) and, except in extraordinary circumstances, no person currently confined in a penal institution may be a member. (The National Alliance does not advocate any illegal activity and expects its members to conduct themselves accordingly.)**

[23] The second document attached to Mr. Potok's affidavit is the National Alliance Bulletin of April/May 1990. It contains a commentary by W.L.P. which are the initials of the National Alliance founder and primary executor under the McCorkill will, William Luther Pierce, entitled "On Being a Front-Line Soldier." He recounts a recent conversation with a skinhead who accused the National Alliance of not being front-line soldiers. The commentary continues in part:

> **I said, well, that depends upon how you define a soldier, but our conversation was over for all practical purposes. It was clear that his conception of a "front-line soldier" is someone who cracks the enemy's skull in the street with a baseball bat, rips his face open with a bicycle chain, or breaks his legs across a curbstone. And that's fine. It's a healthy, red-blooded response to the current situation in America's cities. Any decent White person – certainly, any White male – who can walk six blocks in a major American city without feeling rage rising in himself and a growing desire to engage in such activity needs to have his hormone level checked. It is clear that if *most* White males would respond to their rage in a direct, physical way, as skinheads do, then we would have no race problem, no Jewish problem, no homosexual problem, and no problem with White race traitors in America. Our cities would be clean, decent, safe, and White once again, after a relatively brief period of bloodletting.**

> **The fact is, of course, that most White males will not take direct, physical action against their racial enemies. In fact, the minds of most White males are so addled by love-thy-nigger Christianity and Jewish TV that they don't even know who their enemies are. Still, it is good that a few do, and that they act accordingly. ...**
>
> **...**
>
> **<u>Ultimately, we will win the war only by killing our enemies,</u> not by any clever, indirect schemes which involve no personal risk. We should never forget that, and even if the skinheads served no other purpose than to remind us of it, we should be grateful for their activity. Our only regret in that regard should be that their activity is not better organized and better disciplined.** (Underlining by Grant J.)
>
> **...**

[24] Exhibit 3 to Mr. Potok's affidavit is the National Alliance Bulletin of January, 1994 which contains a commentary by Mr. Pierce entitled "Reorienting ourselves for Success" in which he states:

> **All the homosexuals, racemixers, and hard-case collaborators in the country who are too far gone to be re-educated can be rounded up, packed into 10,000 or so railroad cattle cars, and eventually double-timed into an abandoned coal mine in a few days time.**
>
> **...**
>
> **Those who speak against us now should be looked at as dead men – as men marching in lockstep toward their own graves - ...**

[25] Pierce also wrote novels, one of which, "The Turner Diaries", he dedicated to John Paul Franklin, a serial killer. In an interview on CNN which aired on November 18, 2013 (see Exhibit 4 to Mr. Potok's affidavit), Mr. Franklin

estimates that he killed 22 people. The interviewer writes about the interview and Franklin as follows:

> **"I felt like I was at war. The survival of the white race was at stake," he says. Franklin compares himself to a U.S. soldier in Vietnam, trained to be a sniper in the war. The enemy, he explains, were Jews, blacks and especially interracial couples. "I consider it my mission, my three-year mission. ...**
>
> **...**
>
> ***What was your mission? "To get a race war started."***
>
> **...**
>
> **Franklin's birth name was James Clayton Vaughn and he was born in Mobile, Alabama. He grew up in poverty and lived a childhood of abuse, he says.**
>
> **...**
>
> **He found a family and comfort in the white supremacy groups of the American South in the 1960's. Hitler's autobiographical manifesto, "Mein Kampf," moved him from hate to action. "I had this real strange feeling in my mind," he says. "I've never felt that way about any other book that I read. It was something weird about that book."**
>
> **At 26, he changed his name to Joseph Paul Franklin. Joseph Paul in honor of Paul Joseph Goebbels, the Nazi minister of propaganda, and Franklin after Benjamin Franklin.**

<u>Province of New Brunswick - Intervener</u>

[26] The Intervener, the Province of New Brunswick, filed two affidavits sworn by Kevin Fornshill who is the Chief Executive Officer and Director of Fringe Link Inc., a private company that provides research and training for law enforcement agencies. Mr. Fornshill worked for 24 years for the United States Park Police,

the last two of which he was assigned to work for the Joint Terrorism Task Force of the FBI in Washington, D.C. During that period of time he was involved with research of white extremist groups.

[27] In his affidavit sworn November 26, 2013, Mr. Fornshill attaches a number of exhibits most of which are taken from the National Alliance website or other National Alliance publications. They oppose immigration, promote racism and extol the white race. One posting from September 9, 2010 recounts an incident that occurred at Xavier University concerning the posting by the NA of an inflammatory flyer which referred to a robbery of three students at gunpoint. The flyer, entitled "Just in case they didn't bring this up in your orientation", alleged that "an urban hell surrounds the campus" and urged students to "stop fearing the smears."

[28] The National Alliance became involved in this matter after an article appeared in the Cincinnati Enquirer quoting one of the victims as saying, "We were trying to be nice" to the robbers. Robert Ransdell, the NA's Northern Kentucky Unit coordinator, commented,

> **This is an example of not being prejudiced or worrying about being prejudiced as resulting in somebody being robbed. I think that blacks have become accustomed to the realities of whites these days, and that is that whites are willing to submit – not willing to fight back. They are easy targets... because they have been indoctrinated from the cradle with this white guilt stuff.**

[29] The website also quotes Mr. Ransdell, who approved the flyer, as saying:

> **Some of the stuff was kind of inflammatory in there. But honestly I don't know – and the person that wrote the flyer made a good point. Should we really be sensitive to what we call people who are going to go up and put a gun**

to the head of people just for a few bucks? I'd have to say I'd call them savages.

[30] Mr. Fornshill also attaches to his affidavit a transcript of a July 30, 2011 radio broadcast by Erich Gliebe who has sworn two affidavits in support of the National Alliance in this application. In that broadcast, entitled "Exposing the Holocaust Story", Mr. Gliebe says that the story of the Holocaust has played a big role in the western world for many decades and that it affects the behaviour of people who, because of their blind belief in it, refuse to join and contribute to an organization like the National Alliance that is trying to "remedy the situation." He says, "These fearful Whites can't bear to be perceived as sharing a similar ideology to those people – namely, the German National Socialists – who supposedly killed millions of people… deliberately." He continues,

According to the Jews and their allies, the Holocaust was the attempt on the part of the German National Socialists, to exterminate the race of the Jews. The Germans conceived the plan and tried to carry it out by rounding up Jews from all over Europe, shipping them off to "death camps" and then killing them, usually using the delousing agent Zyklon-B. Masses of Jews were herded into more or less sealed rooms, and then gaseous Zyklon-B was forced into the rooms, killing the unfortunate victims. Most of the victims were then cremated. This extermination process resulted in the deaths of six million Jews and millions of others, including Gypsies, homosexuals and political criminals.

That is, in essence, the "official" version of the Holocaust, and all of the "official" sources pretty much agree on the above mentioned generalities. But if one tries to sift through the glut of so-called "information" on the subject in search of specifics, he is in for a long, discouraging, and wearisome struggle. His labors will most likely turn up only a jumble of contradicting claims and obvious exaggerations. The "specifics" are not specific at all, and in fact, are rather fuzzy. Although essentially all of the "approved" Holocaust literature toes the line when it comes to the 6-million-Jews figure, there are many gross and impossible-to-discount discrepancies in the details, especially

when one sees how the "official" version has changed through the years.

...

[31] Mr. Gliebe then purports to poke holes in the "official" version and expose it as an "enormous Jewish extortion racket." He concludes:

> **So the official version of the Holocaust is not only a money-making scheme, it is also a weapon of restraint. It chains the minds of people and tends to prevent them from trying to fix what is wrong with society, even when they don't LIKE what's going on and, deep down, WANT to do something.**
>
> **...**
>
> **But, from the white racialist perspective, Jews lie a lot – almost habitually, it seems – or at least they bend the truth, turn it into half-lies, and leave out crucial information much of the time. And there is no getting around that sometimes Jews just plain lie about things, and they do so knowingly. So the realization that the Jews have lied for decades about the Holocaust doesn't really strike us as being much different from the way they usually behave.**
>
> **However, as I mentioned earlier in this broadcast, the way that the Holocaust lie is used to browbeat our people into submission and to make a large portion of them fearful to do what they know they SHOULD do to remedy our race's plight... THAT is why the lie that we call the Holocaust must be destroyed. Once that lie is sufficiently exposed and weakened, then the programs and policies of the National Alliance will help to organize our people into a force that will set our race back on the path to a destiny of greatness.**

[32] Mr. Fornshill also references a flyer discussed on the National Alliance website on August 12, 2011 concerning a murder/suicide involving a white girl

and a black boy. The flyer, which was addressed to "white parents" warns "Don't let your daughter date blacks, it might be a matter of life and death."

[33] Mr. Fornshill also includes in his affidavit an excerpt from the National Alliance website of July 6, 2012 which states in part:

> **... People are beginning to see that the survival of our Race is much more important than the survival of the United States as a country. If the country cannot stand for the Race then the Race needs to found a new country. That is the ultimate goal of the National Alliance and the public can see that with the quality people who are members and the understanding of the quality of people we want to recruit that indeed we are a very serious organization and we can be and will be the Vanguard of hope for the racially conscious of our beleaguered people.**

[34] Mr. Fornshill also attaches an excerpt from the National Alliance website of July 7, 2013 following the trial concerning the shooting in Florida of Trayvon Martin by George Zimmerman. The website posting reads as follows:

> **As predicted, riots have begun as a result of the Zimmerman verdict. An interesting note regarding this latest Media Circus is just how obviously they distorted the facts in order to achieve their desired result.**
>
> **On cue from their Jewish masters, professional Race-baiters, Al Sharpton and Jessie Jackson, riled up their followers against Whitey like Voodoo practitioners in a bad horror movie.**
>
> **Never mind the fact that Zimmerman was only half white. Never mind the fact that in the 513 Days Between the Trayvon shooting and the Zimmerman verdict, 11,106 Blacks were murdered by other Blacks.**
>
> **For the first time in decades average White people are seeing past Mainstream Media's lies, thanks to the blatant contradictions regarding this particular case.**

[35] In his affidavit of August 31, 2013, Mr. Fornshill deposes that three members of the National Alliance, including its chief executive officer, were convicted in 2006 of threatening and intimidating a Mexican and Native Americans at a bar in Utah. He also deposes that another member was convicted of attempting to bomb a January, 2011 Martin Luther King, Jr. Day parade in Spokane, Washington.

[36] Finally, Mr. Fornshill deposes that a financial supporter of the National Alliance, whom he describes as a racist skinhead, was responsible for a shooting at an Oak Creek, Wisconsin Sikh Temple in August 2012 though he does not indicate that that individual was convicted of anything.

B'nai Brith - Intervener

[37] Anita Bromberg, who is the national director of legal affairs for the Intervener, The League of Human Rights of B'nai Brith Canada, also filed an affidavit in support of B'nai Brith's position which she swore on September 4, 2013. In that affidavit, she deposes as follows:

> **2. B'nai Brith Canada has been at the forefront of the battle against antisemitism, racism and bigotry since its formation in Canada in 1875. Through the League, B'nai Brith Canada monitors the activities of hate groups in Canada and documents all reported incidents of antisemitism.**
>
> **3. I have been involved in the anti-hate activities of the organization since I began working with the League in 2002 and have co-authored its annual report, *The Audit of Antisemitic Incidents* (herein after referred to as the "Audit"). This report, published annually since 1982 by the League, is a major vehicle for reporting findings of antisemitism to the public.**

4. As documented in the Audit, incidents of antisemitism have shown an increasing trend. Antisemitism of far right groups and individuals have consistently featured in the Audit's findings.

5. Far right groups identified as such in the Audit promote white supremacist, racist viewpoints similar to those held by the National Alliance. While the white supremacist groups in Canada are distinct, they do share ties with American groups often interacting on web forums.

6. Attached to this my affidavit as Exhibit "A" is the 2002 *Audit of Antisemitic Incidents* which documents the continued activities of various white supremacist groups in Canada, the recruitment drives as well as the use of the Internet to spread their brand of hatred.

Centre for Israel and Jewish Affairs - Intervener

[38] Shimon Koffler Fogel is the chief executive officer of the Intervener, The Centre for Israel and Jewish Affairs ("the CIJA"), and has served as the founding national director of community services at the Canadian Jewish Congress. He also served as a consultant to Parliament's standing committee on foreign affairs and is a member of the round table on global security under the Department of National Defence.

[39] In his current position Mr. Fogel spends considerable time studying and researching various organizations that are white nationalist/supremacist and anti-Semitic such as the National Alliance. In an affidavit sworn on November 27, 2013 he deposes that the CIJA's mandate is to represent and protect the Jewish community's interests by maintaining ongoing contact with government and political leadership and with representatives of Canada's diverse cultural communities, with the media and with the general Canadian public.

[40] Mr. Fogel further deposes that the Jewish community has historically been a target of racism, hate and group vilification. He states that one of the objectives of the CIJA is to fight against anti-Semitism in any form in Canada and around the world and that its predecessor organization, The Canadian Jewish Congress, has consistently worked against Nazi, Neo-Nazi, white nationalist and white supremacist organizations.

[41] He recites the following information about the NA as found on the websites of the Southern Poverty Law Center and the Anti-Defamation League:

> **29. According to the Southern Poverty Law Center's (SPLC) website (www.splcenter.org), which I have read, NA materials call for the eradication of the Jews and other races. While the NA and associated groups dehumanize all non-whites as threats to Aryan racial and cultural purity, according to the Handbook, Jews are considered a more pressing threat to the NA than other groups. According to ADL's website, on the subject, the NA's founder in his essay "Who Rules America" wrote:**
>
> > **"The Jewish control of the American mass media is the single most important fact of life, not just in America, but in the world today. There is nothing – plague, famine, economic collapse, even nuclear war – more dangerous to the future of our people."**
>
> **30. The SPLC has reported, and I have read the reports and believe, that the NA has produced and influenced more violent criminals in the last three decades than any other neo-Nazi organization. According to the SPLC reports, NA members were connected to at least 14 violent crimes between 1984 and 2005, including bank robberies, shootouts with police and, in Florida, a plan to bomb the main approach to Disney World.**

31. According to the ADL's website, the NA have used billboards, hung organizational banners in prominent locations, rented booths at gun shows, posted their propaganda materials on public property and distributed NA literature in suburban neighborhoods and on college campuses. The ADL specifically mentions one popular item that has been distributed by the NA at secondary schools and colleges – the SAGA of... White Will!! – a racist, anti-Semitic comic book that encourages students to join the fight for "nationalism and racial and ethnic self-determination everywhere".

32. According to the ADL's website, the NA has also had significant influence through its publication and distribution of books authored by William Pierce. One such book, *The Turner Diaries* calls for the violent overthrow of the government and the systematic murder of Jews and non-whites in order to establish an "Aryan" society. This book has been implicated as a motivation for the 1995 Oklahoma City bombing that caused the death of 168 people and injured 680. The book was also the inspiration behind a crime spree that included murder, robbery and the bombing of a synagogue by a white supremacist gang connected to the NA.

33. According to the ADL's website, *The Turner Diaries* was required reading for the Aryan Republican Army, and influenced white supremacists as far away as Britain, where the book inspired the bombing of ethnic neighbourhoods and a gay bar in London, killing three people in April 2000.

34. According to the ADL's website, in addition to the publication and distribution of Pierce's books, the NA has also been active in promoting hatred through Resistance Records, producing and distributing music replete with fierce lyrics directed against Jews and other minorities. Canadian neo-Nazi skinheads originally founded this operation in 1993. According to ADL's website, Erich Gliebe, Pierce's successor in the winter 2000 issue of NA's Resistance magazine, described the utility of white power music as

"awakening and mobilizing the White Youth of today into a revolutionary force to destroy the system.

Fred Gene Streed - Respondent

[42] The respondent, Fred Gene Streed, filed an affidavit in response to this application in which he recites what he has done as executor of the estate to date. He addresses the application in the following paragraphs:

> **12. The affidavit of Mr. Potok on behalf of the Southern Law Center I believe to be deliberately misleading, because the documentation used is from the early years of the foundation and existence of the National Alliance. Articles written by the founder Mr. Pierce more than a decade before his death in 2002 are being advanced as a basis for invalidating the Testator's Will more than a decade after Pierce's death. A picture of Adolf Hitler is clearly submitted for inflammatory, not probative, value. To the extent that the testator sympathized with the purposes of the National Alliance I believe he was simply exercising his political freedom.**
>
> **13. It is also my belief that the political writings of the founder of the National Alliance, William L. Pierce, were legal and in compliance with the laws of the United States of America at the time they were written. As the laws and the social mores of the United States have changed with time the message and views expressed by the organization have also changed. These changes were advocated in no small part by the Testator, Harry Robert McCorkill, before his death. It is my belief that this is why Mr. Potok has had to rely on material several decades out of date.**
>
> **14. The additional mention of specific individuals and their crimes and punishment is a transparent attempt to smear the Testator and Beneficiary with guilt by association, which I believe is not a legitimate method of legal proof. Since I am not affiliated with the National Alliance I prefer to leave the particulars of these matters to the present head**

of the National Alliance, Mr. Erich Gliebe, who has better access to the true facts of membership alleged for those individuals in the affidavit of Mr. Potok than I can command from my own recollections.

[43] Erich J. Gliebe has been Chairman of the National Alliance since 2002 when William Luther Pierce died. He deposes, *inter alia*, as follows:

> **2. I became Chairman of the National Alliance (NA) in 2002 by a vote of the members of the Board of Directors, succeeding William Luther Pierce who died in 2002. I was personally acquainted with him and with the Testator named in the present proceeding, Harry Robert McCorkill.**
>
> **3. When I joined the NA in 1990 it was my aim to introduce traditional European culture to its activities. My own heritage and background are German and I had always been interested in history and my heritage. I believed the NA presented current and historical events accurately and that it addressed concerns of people of European descent. At the time I was a member of a German folk dance group which performed at festivals and other functions.**
>
> **4. It was my aim to introduce traditional European culture to the NA, so I organized the Cleveland Local Unit well enough that we were able to promote its first cultural festival in November 1996, and subsequent cultural festivals in Cleveland, St. Louis and Detroit. This endeavour was assisted by the Resistance Records label, purchased by William Pierce in 1999. He felt we should reach young people through their music, and then introduce them to classical and European folk music. The record label did have some success in that aspect, and some new members attended the cultural festivals.**
>
> **...**
>
> **6. Because of the attention given to the NA in the affidavit of Mark Potok, I make this affidavit chiefly**

in rebuttal of the characterizations therein of the NA as a neo-Fascist organization and of alleged concerns with public policy.

7. Throughout my years in the NA, I have been aware of Mr. Potok's writings for the Southern Poverty Law Center (SPLC) and its publications, in particular because it has depicted the NA as a "hate group". From this I believe the SPLC distorts the facts and publishes false reports about the NA and its members.

...

11. With regard to specific accusations in Mr. Potok's affidavit, I believe it is misleading the Court to refer to language from the NA's foundational document, decades old, to stir up concerns that the present-day NA has violent intentions. I am aware of current media reports that decades ago Canadian authorities may have carried out nutritional experiments on aboriginal schoolchildren. I see the Potok affidavit as a similar attempt to inject the past into the present.

12. With regard to specific allegations about individuals, Potok's paragraphs 13 and 14, after consulting or reviewing such records as are available to me, I can say that on that basis I believe McVeigh and Compton were never members of the NA, that no records appeared for Vanbiber, Carlson and Page, that Mathews left the NA in the 1980's to form his own group, and that Hanson was a member for a time. Carrothers was dismissed after being convicted, Harpham was dismissed for non-payment of dues six years before the incident alleged, that McGhee left four years before the incident alleged.

13. In the current edition of the NA Members' Handbook (2005) appears on page 9: "The National Alliance continues to maintain a Zero Tolerance policy towards illegal activity and any member involved,

> **suggesting or even hinting (at) such activities will be immediately expelled from the organization." ...**
>
> **14. Under my leadership the NA began requiring applicants for membership to undergo a probationary period of at least one-year before admission (2011); more recently the Board of Directors approved having only supporters rather than members. In my broadcast and other statements on behalf of the NA I speak of the need to get back to real activism and offer viable alternatives to the decadent practices surrounding us. I have not been able to verify Potok's Exhibit 7, but the NA has no programs in Canada.**

[44] Mr. Gliebe filed a second affidavit sworn November 12, 2013 in opposition to the application but it does not address the issue of public policy which has been raised by this application.

[45] The respondent also filed an affidavit from Malcolm Ross, which deals with his involvement in preserving the assets of the estate and includes an exhibit critical of the Southern Poverty Law Center. In that exhibit which Mr. Ross describes as "reputable commentary," the author lists several alleged "lies" of the SPLC, in one of which he states:

> **SLPC (sic) again uses guilt by association logic and tries to portray Chuck Baldwin's Liberty Fellowship Church in Kalispell, MT as a gathering of anti-government white supremacists.**
>
> **...**
>
> **SPLC ignores the quality of people who regularly attend and contribute to Liberty Fellowship's services. It also ignores that there are people who attend that are Chinese, African, Spanish, Canadian, Native Indian, among other ethnicities.**

The Canadian Association for Free Expression - Intervener

[46] The Intervener, The Canadian Association for Free Expression ("CAFE"), filed an affidavit in opposition to this application sworn by its executive director, Paul Fromm, in which he states *inter alia*:

> **1. I am the Executive Director of the Canadian Association for Free Expression, (CAFE) and as such have personal knowledge of the information sworn to below and am authorized to speak on behalf of the Association.**
>
> **...**
>
> **3. The objectives of CAFE are as follows:**
>
> **(a) To operate exclusively as a charitable corporation for the purposes of education and general benefit to the community;**
>
> **(b) To promote respect for and observance of freedom of speech and expression generally;**
>
> **(c) To engage in and to encourage research into and awareness of freedom of speech and expression generally in light of common law tradition and the Charter of Rights and Freedoms of the Constitution of Canada;**
>
> **(d) To establish and fund educational scholarships and research programs, provided however, that no funds or assets of the Corporation shall be:**
>
> **(i) used for any political purpose;**
>
> **(ii) paid to any political organization.**
>
> **...**
>
> **5. Over the past thirty years, CAFE has developed an enhanced knowledge and expertise in relation to the issue of freedom of speech and expression.**

...

7. CAFE has an interest and mandate in ensuring and protecting the Fundamental Freedoms contained in Section 2 of the Canadian Charter of Rights and Freedoms, specifically, Section 2(a) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication and Section 2(d) freedom of association.

8. CAFE has no financial interest in the disposition of this Estate.

[47] In his affidavit Shimon Koffler Fogel challenges the *bona fides* of both The Canadian Association for Free Expression and Mr. Fromm as follows:

35. In 1981 Paul Fromm founded the Canadian Association for Free Expression (CAFE) and remains its leader.

36. Attached as Exhibit "A" is a copy of the Wikipedia website pertaining to Paul Fromm, which I have read.

37. CAFE presents itself as an organization concerned with the promotion and preservation of Freedom of Speech but its record of activism suggests a different agenda.

38. In 2004 CAFE was a signatory to the New Orleans Protocol, a gathering of white nationalist leaders such as Don Black (Stormfront), Kevin Alfred Strom (former managing director of National Vanguard), Willis Carto (founder of the Holocaust denial organization Institute for Historical Review) and David Duke (former grand Wizard of the Ku Klux Klan).

39. In the early 1990's Mr. Fromm was a speaker at several events hosted by the Heritage Front, including events marking the birthday of Adolf Hitler and honouring the memory of Robert Matthews

(leader of the nationalist group, The Order) at a "Martyr's Day Rally".

40. When his activities became known to his employer, The Peel Board of Education, he was warned that continued participation would result in a recommendation for termination.

41. In 1997 Mr. Fromm was terminated from his position as a teacher by the Peel Board of Education because of his continued involvement in such activities. ...

42. Mr. Fromm has published numerous YouTube videos on the Internet promoting his ideas. I have viewed several of Mr. Fromm's YouTube videos. Mr. Fromm introduces himself in these videos as the "Midnight Man" for Stormfront Radio, with a show every night at midnight eastern time. The videos reference the www.stormfront.org website and promote it. Attached as Exhibit "C" is a copy of a publication on the Stormfront forum website (www.stormfront.org/forum). This document references "the Jewish Problem" and more specifically that:

> **"The origin of the problem with the Jews is, once again, in the blood. As a group, as a *race*, they suffer from psychopathy – a mental disorder whose main symptom is the ability to lie like there is no tomorrow."**

ANALYSIS AND DECISION

[48] Much of the content of the affidavits filed by the respondent focused on discrediting the SPLC's evidence as being deliberately misleading, containing half truths and implying guilt by association. However, even if I accept every allegation these deponents make against the SPLC, that does not change the writings of the NA from William Luther Pierce 20 years ago to Erich Gliebe and others today, along with their foundational documents, Mr. Pierce's writings, their website, their other publications, and the transcripts of Mr. Gliebe's radio

broadcasts. All of these publications can only be described as racist, white supremacist and hate-inspired. They are disgusting, repugnant and revolting.

[49] While they may be protected by the first amendment under the US Constitution, there is a difference between that Constitution and the ***Canadian Charter of Rights and Freedoms*** which protects freedom of speech under Section 2(b) but also provides under Section 1 thereof:

> **The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.**

[50] Section 319 of the ***Criminal Code of Canada*** makes the public incitement of hatred a criminal offence. Section 319(2) states:

> **(2) Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of**
>
> > **(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or**
> >
> > **(b) an offence punishable on summary conviction.**

[51] In the case of ***R. v. Andrews***, [1990] 3 S.C.R. 870, the court considered the constitutionality of the predecessor to Section 319. In ***Andrews***, the majority decision written by Dickson, C.J. upheld the constitutionality of Section 319(2) of the ***Criminal Code*** and, in doing so, adopted much of the reasoning of Cory, J.A. then of the Ontario Court of Appeal.

[52] Cory, J.A. found that Section 319(2) of the ***Criminal Code*** violated Section 2(b) of the ***Charter of Rights and Freedoms*** but that it was justified under Section 1 of the ***Charter***. In reviewing his decision, Dickson, C.J. states:

The appellants belonged to the Nationalist Party of Canada, a white nationalist political organization. Mr. Andrews was the party leader and Mr. Smith its secretary. Both were members of the party's central committee, the organization responsible for publishing and distributing the bi-monthly *Nationalist Reporter*. This publication constitutes the primary subject-matter of the prosecution and was subscribed to by 43 individuals and 50 groups, clubs or organizations.

Pursuant to a search warrant, 89 materials were seized from the home of the appellants. Included in these materials were copies of the *Nationalist Reporter*, letters written by subscribers, subscription lists and mimeographed sticker cards containing such messages as "Nigger go home", "Hoax on the Holocaust", "Israel stinks" and "Hitler was right. Communism is Jewish". The ideology expressed by the material was summarized as follows by counsel for the appellants:

> **... the material argues that God bestowed his greatest gifts only on the "White people"; that if it were God's plan to create one "coffee-coloured race of 'humanity' it would have been created from Genesis"; and that therefore all those who urge a homogeneous "race-mixed planet" are, in fact, working against God's will. In forwarding the opinion that members of minority groups are responsible for increases in the violent crime rate, it is said that violent crime is increasing almost in proportion to the increase of minority immigrants coming into Canada. A high proportion of violent crimes are committed by blacks. America is being "swamped by coloureds who do not believe in democracy and harbour a hatred for white people." The best way to end racial strife, an excerpt opines, is by a separation of the races "through a repatriation of non-whites to their own lands where their own race is the majority..." The "Nationalist Reporter" also promulgated the thesis that Zionists had fabricated the "Holocaust Hoax" and that because Zionists dominate financial life and resources, the nation cannot remain in good health**

> **because the "alien community's interests" are not those of the majority of the citizens either culturally or economically.**
>
> **Cory J.A. in the Ontario Court of Appeal, referring specifically to the contents of the *Nationalist Reporter* and other publications of the Nationalist Party, characterized this material as "rubbish and offal", and stated that the writings were "malodorous, malicious and evil".**

[53] Dickson, C.J. later discussed Cory, J.A.'s conclusion that s. 1 of the ***Charter*** saved the constitutionality of section 319(2) of the ***Criminal Code.*** He continued:

> **... Instrumental in reaching this conclusion was his rejection of the argument that the dissemination of hate propaganda represents little harm to society. Cory J.A. was unable to discount the danger presented by such expression, noting that s. 319(2) was introduced into the *Criminal Code* only after extensive study by the Special Committee on Hate Propaganda in Canada (hereinafter "the Cohen Committee") and, in a passage which has been much quoted, stating (at pp. 179-80):**
>
> > **I would have thought it sufficient to look back at the quintessence of evil manifested in the Third Reich and its hate propaganda to realize the destructive effects of the promotion of hatred. That dark history provides overwhelming evidence of the catastrophic results of expressions which promote hatred. The National Socialist Party was in the minority in the Weimar Republic when it attained power. The repetition of the loathsome messages of Nazi propaganda led in cruel and rapid succession from the breaking of the shop windows of Jewish merchants to the dispossession of the Jews from their property and their professions, to the establishment of concentration camps and gas chambers. The genocidal horrors of the Holocaust were made possible by the deliberate incitement of hatred against the Jewish and other minority peoples.**

> **It would be a mistake to assume that Canada today is necessarily immune to the effects of Nazi and other hate literature.**

In light of the above comment, Cory J.A. concluded that the public and willful promotion of hatred against identifiable groups was the very antithesis of all the essential values and principles stressed by this Court in *Oakes, supra*, and that the aim behind s.319(2) clearly constituted a pressing and substantial objective under s.1.

Considering next whether the proportionality of s. 319(2) to Parliament's valid objective met the requirements of *Oakes*, a number of factors led Cory J.A. to conclude that the provision was justifiable under s. 1. He noted, for instance, that the need for communications to promote "hatred" prevented an unduly wide limitation upon the freedom of expression, stating (at p. 179):

> **Hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition in [s. 319(2)]. When an expression does instill detestation it does incalculable damage to the Canadian community and lays the foundations for the mistreatment of members of the victimized group.**

[54] These eloquent statements are equally applicable to the evidence that is before the court in this application. Mr. Streed asserts that the writings of the NA attached to Mr. Potok's affidavits are dated while Erich Gliebe says it is misleading to rely on the NA's foundational documents to "smear" them. However, there is nothing "dated" about the anti-semitic rantings of Mr. Gliebe, the current Chair of the National Alliance, in his 2011 radio broadcast, the transcript of which is set out in Mr. Fornshill's affidavit. (See paragraph 31, *supra.*).

[55] Neither is there any evidence before the court that the NA has distanced itself from its "dated" foundational documents. Mr. Gliebe says that the NA now has "supporters" rather than "members". In the same paragraph he says that the NA now requires its members/supporters to "undergo a probationary period of at least one year before admission". However, he doesn't elaborate as to how those measures render the organization's vitriol "dated" or any less repugnant.

[56] The respondent also submits that the writings of the NA were not in violation of any laws in the United States when they were published. However, they clearly violate the ***Criminal Code of Canada*** and this court takes judicial notice of the fact that in this age of the internet national boundaries are meaningless for purposes of spreading hate propaganda such as that disseminated by the NA. In that regard I also accept and rely on the evidence of Anita Bromberg that white supremacist groups in Canada share ties with American groups and interact with them on web forums.

[57] This brings me to the first salient question in this application, whether or not the NA disseminates information that is in violation of public policy in Canada.

[58] What constitutes public policy is a question that has been considered in many cases. In the case of ***Re: Wishart Estate (No. 2)*** 1992 CanLii 2679 (NBQB); (1993) 129 NBR (2d) 397 Riordon, J. considered whether or not a direction in a will to destroy four horses violated public policy. He quoted extensively from the Missouri case of ***Eyerman et al v Mercantile Trust Co. N.A. et al*** 524 S.W.2d 210 including the following:

> **The term 'public policy' cannot be comprehensively defined in specific terms but the phrase 'against public policy' has been characterized as that which conflicts with the morals of the time and contravenes any established interest of**

> **society. Acts are said to be against public policy 'when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality'. Dille v. St. Luke's Hospital, 355 Mo. 436; 196 S.W. 2d 615, 620 (1946); Brawner v. Brawner, 327 S.W. 2d 808, 812 (Mo. banc 1959).**

[59] In ***Canada Trust Co. v. Ontario Human Rights Commission*** [1990] O.J. No. 615 (O.C.A.) the court considered whether a trust document establishing a charitable trust based on white supremacy, religious supremacy, racism and sexism violated public policy. Writing for the majority, Robins, J.A. stated at paragraph 34:

> **34. Viewing this trust document as a whole, does it violate public policy? In answering that question, I am not unmindful of the adage that "public policy is an unruly horse" or of the admonition that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds": Re Millar, [1938] S.C.R. 1, [1938] 1 D.L.R. 65 [per Crocket J., quoting Lord Aitkin in Fender v. Mildmay, [1937] 3 All E.R. 402, at p. 13 S.C.R.]. I have regard also to the observation of Professor D.W.M. Waters in his text on the Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), at p. 240 to the effect that:**
>
> > **The courts have always recognized that to declare a disposition of property void on the ground that the object is intended to contravene, or has the effect of contravening public policy, is to take a serious step. There is the danger that the judge will tend to impose his own values rather than those values which are commonly agreed upon in society and, while the evolution of the common law is bound to reflect contemporary ideas on the interests of society, the courts also feel that it is largely the duty of the legislative body to enact law in such matters, proceeding as such a body does by the process of debate and vote.**

> **Nonetheless, there are cases where the interests of society require the court's intervention on the grounds of public policy. ...**

[60] In the case of ***Re Estate of Charles Millar, Deceased*** [1938] S.C.R. 1 Duff C.J. stated at p. 4:

> **It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. It is, in our opinion, important not to forget that it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates.**

[61] Public policy, then, embodies the "interests of society" as expressed in the morals of the time, the common law and legislation. In respect to the latter in ***Canada Trust Co****., supra*., Tarnopolsky, J.A. stated at paras. 92-94:

> **92 Public policy is not determined by reference to only one statute or even one province, but is gleaned from a variety of sources, including provincial and federal statutes, official declarations of government policy and the Constitution. The public policy against discrimination is reflected in the anti-discrimination laws of every jurisdiction in Canada. These have been given a special status by the Supreme Court of Canada in Ontario Human Rights Comission v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 (note), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C. Paragraph17, 002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (note), 64 N.R. 161, 12 O.A.C. 241, at p. 547 S.C.R., p. 329 D.L.R.**
>
> **The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of**

> **a human rights code the special nature and purpose of the enactment (see Lamer J. in Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145 at pp. 157-58), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional, but certainly more than the ordinary – and it is for the courts to seek out its purpose and give it effect.**
>
> **93 In addition, equality rights "without discrimination" are now enshrined in the Canadian Charter of Rights and Freedoms in s. 15; the equal rights of men and women are reinforced in s. 28; and the protection and enhancement of our multicultural heritage is provided for in s. 27.**
>
> **94 Finally, the world community has made anti-discrimination a matter of public policy in specific conventions like the International Convention on the Elimination of All Forms of Racial Discrimination (1965), G.A. Res. 2106 A (XX), and the International Convention on the Elimination of All Forms of Discrimination Against Women (1979), G.A. Res. 34/180, as well as Articles 2, 3, 25 and 26 of the International Covenant on Civil and Political Rights (1966), G.A. Res. 2200 A (XXI), all three of which international instruments have been ratified by Canada with the unanimous consent of all the provinces. It would be nonsensical to pursue every one of these domestic and international instruments to see whether the public policy invalidity is restricted to any particular activity or service or facility.**

[62] In my view engaging in activity which is prohibited by Parliament through the enactment of the ***Criminal Code of Canada*** falls squarely within the rubric of a public policy violation. In addition, as the applicant has pointed out, the NA's various communications and activities contravene the values set out in the ***Charter of Rights***, provincial human rights legislation as well as the International Conventions which Canada has signed all of which promote equality and the dignity of the person while prohibiting discrimination based on various grounds, including race and ethnic origin.

[63] I find that the information the NA disseminates is hate propaganda which is every bit as "malodorous, malicious and evil" as the material excerpted by Dickson, C.J. in ***R v. Andrews,*** *supra*. and which is of the kind targeted by the ***Criminal Code*** which makes its dissemination illegal. It follows, therefore, and I further find, that the dissemination of it by the NA violates the public policy of Canada.

B. Should the court declare the bequest to be invalid, given that it is made to a beneficiary whose activities are contrary to public policy, but not made for specific purposes?

[64] The respondent and CAFE also submit that cases where the courts have struck wills down as being against public policy are limited and only involve cases where the bequest itself is objectionable such as in the case of ***Re Wishart Estate***, *supra*. They submit that the jurisprudence deals with repugnant conditions that are attached to bequests, not to the quality of the beneficiary as a person or organization. They submit that even in cases where a person has a criminal record, they are still entitled to receive a bequest, the obvious exception being where the crime, such as murder, was committed in order to obtain the bequest. On that issue see Tarnow, N.M. ***Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates,*** (1980), 58 Can. Bar Rev. 582.

[65] CAFE cites the case of ***Bolianatz Estate v. Simon***, [2006] S.J. No. 64 where the court refused to invalidate a gift to a beneficiary who had been stealing from the testator prior to the testator's death. In that case Richards, J.A., in separate but concurring reasons, stated at paragraphs 58 & 59:

> **... the general orientation of the law is very much against involving the courts in superintending the question of whether particular beneficiaries merit their inheritances. Bequests are not denied because a beneficiary is of bad**

> **character, has behaved immorally or has been involved in criminal activity.**
>
> **In terms of general principle, this recommends itself as a sound approach. It fits with the basic assumption that individuals are entitled to dispose of their property as they see fit. It promotes certainty and efficiency in the handling of wills by avoiding costly and protracted disputes over the proper allocation of testators' assets. And finally, it recognizes and avoids the deep problems involved in attempting to identify the particular kinds of behavior which should deny an inheritance.**

[66] They also rely on ***Jake Estate v. Antleman*** 2006 NBQB 371 where Creaghan, J. refused to void a gift as being against public policy. In that case, he stated at paragraph 22:

> **Although it may be argued that policies of the State of Israel are not in total conformity with policy of Canada as the country where the Will was executed and with whose law the validity of the Will must conform, I cannot find any basis for finding that a testamentary gift to the Government of Israel is contrary to public policy.**

[67] CAFE submits that there is nothing objectionable within the bequest itself. The only objection lies, they submit, within the applicant's perception of the beneficiary and that it should not be interfered with.

[68] They further submit that the gift merely expresses Mr. McCorkill's desire to benefit the National Alliance. There is no evidence, they submit, that the gift contains any conditions or connotation of violence. In that regard, they rely on Section 2 of the ***Charter of Rights*** which guarantees freedom of speech. They further submit that if a testamentary gift is not subject to any conditions which call for a use that is against public policy then the court should not interfere with the testator's right or freedom to dispose of his estate as he sees fit.

[69] They further submit that if the court intervenes it will open the floodgates to frivolous estate litigation. They submit that the certainty which has long been associated with testamentary bequests and which has served the English common law tradition so well will be eroded if courts intervene in cases where the character and/or quality of the beneficiary is challenged because that, they submit, is irrelevant.

[70] They further submit that since Mr. McCorkill would have been entitled to give money to the National Alliance while he was alive, there should be no reason he cannot do so on his death.

[71] Finally, the respondent submits that there is no evidence before the Court that if the will is upheld the National Alliance will use the money against any minority groups. They support CAFE's submissions and, in particular, submit that voiding this bequest would set a dangerous precedent.

ANALYSIS AND DECISION

[72] While the jurisprudence on voiding bequests on the grounds of public policy tends to deal with conditions attached to specific bequests, in my opinion the facts of this case are so strong that they render this case indistinguishable from those.

[73] Unlike most beneficiaries, the National Alliance has foundational documents which state its purposes. Moreover, those purposes have been expanded upon, explained and disseminated in various forms of media by the NA since its inception. They consistently show that the National Alliance stands for principles and policies, as well as the means to implement them, that are both illegal and contrary to public policy in Canada. If the organization has changed in these respects since its inception then it was incumbent upon the respondent, particularly through the evidence of Erich Gliebe, the current

President of the National Alliance, to demonstrate that in this application. It has not done so.

[74] The facts of this case can be distinguished from most other cases because in most cases, a beneficiary of an estate does not "stand for" something identifiable. They don't have foundational documents. A drug dealer does not "stand for" dealing drugs. He or she may have a criminal record of doing that but that does not mean that that is what they stand for. Their crimes are not the purpose for which they exist, their *raison d'être*.

[75] Unlike in the ***Jake Estate*** case, *supra*., where there was no finding by the court that the State of Israel's *raison d'être* was contrary to public policy in Canada, in this case it is abundantly clear that what the National Alliance stands for and has stood for since its inception, its *raison d'être*, is contrary to public policy in Canada. In fact, as mentioned earlier, what it stands for, anti-semitism, eugenics, discrimination, racism and white supremacy, violates numerous statutes and conventions that have been passed by Parliament and the Legislatures and endorsed by the Government of Canada, including the ***Criminal Code***.

[76] The evidence before the court convinces me that in the case of the NA the purpose for which it exists is to promote white supremacy through the dissemination of propaganda which incites hatred of various identifiable groups which they deem to be non-white and therefore unworthy. Those purposes and the means they advocate to achieve them are criminal in Canada and that is what makes this bequest repugnant.

[77] It is also what makes this situation comparable, in my view, to a gift to a trustee for a purpose that is contrary to public policy. The law of wills is concerned with the intent of the testator and from the very fact that Mr.

McCorkill left his entire estate to the NA I infer that he intended it to be used for their clearly stated, illegal purposes. For me to find that such a gift was valid would require that I ignore an overwhelming body of evidence. The Court of Appeal has made the point on more than one occasion that trial judges must not "check their common sense at the court room door". Allowing this bequest to stand because it doesn't repeat those stated purposes but bestows the bequest on the organization whose very existence is dedicated to achieving them would be doing just that, in my view.

[78] Moreover, while the bequest doesn't advocate violence, it would unavoidably lead to violence because the NA, in its communications, both advocates violence and supports its use by others of like mind such as skinheads. It attempts, in some of its writings, to profess zero tolerance for violence or illegal activity but its writings and publications consistently expose those disclaimers as disingenuous.

[79] In its foundational documents, and more recently in Mr. Gliebe's affidavit opposing this application which he swore on July 26, 2013, the NA attempts to project an image of itself as a cultural organization promoting traditional European culture and heritage to young people through music and festivals. These feeble protestations only call to mind the attempts by the Nazis in Hitler's Germany to mask their true intentions through organizations like the Hitler Youth. History tells us that behind the mask lurked some of the worst evil ever visited on the human race.

[80] Mr. Gliebe also protests that the NA's records show that the Oklahoma bomber, Timothy McVeigh, and others identified by the SPLC as having been inspired by the writings of the NA were never members of the NA. In my view the fact that there is credible evidence before the court of any connection, no matter how small, between the NA and the evil visited on society by people such

as McVeigh and Joseph Paul Franklin only underlines what Cory, J.A. (as he then was) called "… the destructive effects of the promotion of hatred." and "… the catastrophic results of expressions which promote hatred.": see paragraph 53, *supra.*

[81] CAFE further submits that decisions such as this dealing with public policy should be left to Parliament and the Legislatures and that the courts should not interfere. (See also para. 59, *supra.*) That submission ignores the fact that Parliament has spoken loudly and clearly on this very subject in s. 319(2) of the ***Criminal Code*** as well as the fact that the New Brunswick Legislature has enacted the ***Human Rights Act***, R.S.N.B. 1973 c. H-11, the preamble to which states, in part:

> **Whereas recognition of the fundamental principle that all persons are equal in dignity and human rights without regard to race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition or political belief or activity is a governing principle sanctioned by the laws of New Brunswick; …**

[82] That submission also might have carried more weight if, in this case, the Attorney General had not intervened. However, the Attorney General has intervened and clearly stated the position of the government that this bequest is in violation of the public policy of this province and should be voided. It would not be practical for legislatures to pass legislation dealing with individual wills. An intervention such as this by the Attorney General is the only practical way for a government to deal with a particular case in order to ensure that the principles set out in legislation such as the ***Human Rights Act****, supra.*, are upheld. That intervention sends a strong message about the effect of this bequest on the public policy of this province.

[83] CAFE also submits that since Mr. McCorkill was legally permitted to donate money to the NA during his lifetime there is no compelling legal

argument for prohibiting him from doing so on his death. I don't accept the premise of that submission. He may have been able to donate to the NA during his lifetime but I absolutely reject the submission that it was legal for him to assist an organization in the dissemination of hate propaganda. As mentioned earlier the NA's activities offend section 319(2) of the ***Criminal Code*** and, as a contributor, he would have been a party to that offence.

[84] Moreover, even if the bequest were not illegal but violated public policy for other reasons, the court could still void it. In ***Egerton v Brownlow*** (1853) 10 Eng. Rep. 359 (H.L.C.) the Lord Chief Baron discussed this in the following passage at p. 417:

> **... The owner of an estate may himself do many things which he could not (by a condition) compel his successor to do. One example is sufficient. He may leave his land uncultivated, but he cannot by a condition compel his successor to do so. The law does not interfere with the owner and compel him to cultivate his land (though it be for the public good that land should be cultivated) so far the law respects ownership; but when, by a condition, he attempts to compel his successor to do what is against the public good, the law steps in and pronounces the condition void, ...**

[85] Thus, in this case if the right of free speech in Canada were unfettered by the ***Criminal Code*** and Mr. McCorkill could have legally donated to the NA while he was living, this court would still have the authority, on making a finding that the bequest violates public policy, to step in and declare it void. See also ***Fox v Fox estate*** 1996 CanLii 779 at p. 11.

[86] Mr. Streed also submits that there is no evidence before the court that the NA will use the bequest for any purposes that violate public policy such as inciting hatred against Jewish people and other identifiable minorities. The answer to that submission is found in the foundational documents of the NA which demonstrate that it is dedicated to precisely that and related purposes as

the means of achieving white supremacy, white living space and its other racist goals. The fact that it may use some of the bequest to pay someone to clean its office premises or to fund a cultural festival does not mean that the bequest is used for other purposes. All of its activities are clearly focused on achieving its core purposes and thus any money it spends, from whatever source or for any activity, contributes, either directly or indirectly, to achieving those purposes.

[87] Finally, CAFE and the respondent submit that if the Court intervenes and voids the bequest because of the nature of the beneficiary then the floodgates will be open and estate litigation will flourish where bequests are left to persons who are not of stellar character. In my view, there is little risk of that. Each case must be dealt with on its own merits and I have little doubt that the expense of litigation will discourage frivolous applications. It is difficult to imagine too many applications that would be based on such a strong factual background as this one. On the contrary, in my view, if the court allowed this bequest to stand it would increase the risk of opening the door to bequests to other criminal organizations.

[88] Moreover, the jurisprudence concerning cases that are contrary to public policy goes back 200 years in the English common law tradition and more than a century in Canada alone. Despite that long history, it can hardly be said that there has been a deluge of cases where the courts have intervened in an estate or trust or even a contract on the grounds of public policy.

[89] I therefore find that while the voiding of a bequest based on the character of the beneficiary is, and will continue to be, an unusual remedy, where, as here, the beneficiary's *raison d'être* is contrary to public policy, it is the appropriate remedy.

DISPOSITION

[90] In summary, I find that the purposes of the National Alliance and the activities and communications which it undertakes to promote its purposes are both illegal in Canada and contrary to the public policy of both Canada and New Brunswick. Consequently, I declare the residual bequest to it in the will of Harry Robert McCorkill to be void.

[91] I further declare that as a result of this finding, there is an intestacy with respect to the residue of the estate of Harry Robert McCorkill and that the residue shall be divided amongst the next of kin of the said Harry Robert McCorkill in accordance with the ***Devolution of Estates Act***, R.S.N.B. 1973 c.D-9, as amended.

[92] With respect to the administration of the estate, Ms. McCorkill requests that I direct Mr. Streed to turn the assets of the estate over to her lawyer in trust and order Mr. Streed to pass his accounts within 30 days. However, I have not, by this decision, removed Mr. Streed as executor or otherwise invalidated the will nor has Ms. McCorkill provided any grounds for removing Mr. Streed as executor. That would require a separate application under the Probate Rules.

[93] With respect to Mr. Streed's accounts, if he wishes to have them passed for whatever reason, including if he wishes to resign as executor, then he can renew the application he previously made for that purpose to the Probate Court.

[94] Ms. McCorkill also requests, and I hereby make, an order permanently enjoining any individual associated with the estate from distributing, paying or transferring the residue of the estate or any part thereof to the National Alliance without further order of either this Court or the Probate Court.

COSTS

[95] Ms. McCorkill is entitled to her costs on a solicitor and client basis from the estate. Mr. Streed is also entitled to his costs from the estate on a solicitor and client basis. While he has not been successful, he did not write the will. Mr. McCorkill did and Mr. Streed had a duty to propound it as the surviving executor.

[96] The province has not requested costs and CAFE has been unsuccessful in its intervention. While the submissions of CIJA and B'nai Brith have both been helpful, their own purposes were also served by intervening so I will award them each a lump sum of $3,000.00 including disbursements to be paid out of the estate.

_____

William T. Grant
Judge of the Court of Queen's Bench
of New Brunswick

Court of Queen's Bench of Alberta

Citation: R. v. Hirsekorn, 2011 ABQB 156

Date: 20110314
Docket: 101553758S1
Registry: Medicine Hat

Between:

Her Majesty the Queen

Respondent

- and -

Garry Hirsekorn

Appellant

Oral Reasons for Judgment
of
Chief Justice Neil Wittmann

INTRODUCTION

[1] The Blood Tribe and Siksika Nation, members of the Blackfoot Confederacy, have applied to this Court for Intervenor status in this appeal. The Appellant was convicted of shooting wildlife not in a regular season pursuant to s. 25(1) of the **Wildlife Act**, RSA 2000, c. W-10 as well as being in possession of wildlife without a valid wildlife permit, pursuant to s. 55(1) of the **Wildlife Act**; ***R v. Hirsekorn***, 2010 ABPC 385.

[2] In his lengthy written reasons, the learned trial judge considered a Constitutional Notice claiming that the Appellant was exempt from the **Wildlife Act** sections on the grounds that the sections are invalid as they infringe the unextinguished Aboriginal right to hunt for food in Alberta set forth in s. 35 of the **Constitution Act**, 1982. The Appellant claims his Metis status entitles him to constitutional protection.

BACKGROUND

[3] The key findings of the trial judge included that the Appellant self-identified as a Metis, that the Appellant was not hunting for subsistence nor for ceremonial purposes; that what was before him was a collateral attack on the validity of the **Wildlife Act** sections in question and that the collateral attack before him was inappropriate. Further, the learned trial judge found a constitutional right protected by s. 35 of the **Constitution Act, 1982,** but not equating to Aboriginal title must be established by the consistent and frequent pattern of usage and occupation of a site specific area and cited a number of factors from ***R v. Powley***, [2003] 2 S.C.R. 207 as a statement of the law which he must apply. The six factors he cited at para 112 of the judgment were:

1. Not all people of mixed ancestry will have s. 35 rights, as the term "Metis" does not encompass all individuals with mixed Indian and European heritage;

2. A Metis community is a group of Metis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life;

3. Metis rights are contextual and site specific;

4. The community must have shared traditions and customs;

5. The community must be identifiable with some degree of continuity and stability;

6. Aboriginal rights are communal, and must be grounded in the existence of a historic and present community.

[4] He concluded at para 134, based on his findings of fact, that prior to the arrival of the Northwest Mounted Police, no Metis group had a sufficient degree of use , occupation, stability, or continuity in southern Alberta to support a site specific constitutional right nor did the evidence establish a Metis group in southern Alberta with customs, traditions and a distinct collective identity from that of Indians.

[5] The trial judge also found that effective political and legal control of the area known as southern Alberta began with the arrival of the Northwest Mounted Police which occurred between the years 1874 to 1878.

[6] He also found there was neither an historic nor modern Metis community necessary to satisfy the ***Powley*** test in southern Alberta and that the modern Metis community in Medicine Hat was not the equivalent of a contemporary rights bearing community.

[7] In his reasons, the trial judge did an extensive review of his findings of fact based on Aboriginal and Metis history from Ontario westward. He included reference to Treaty #7, and described the Blackfoot Territory being an area lying south of the North Saskatchewan River, east of the Rocky Mountains, west of the Cypress Hills and some land in the northern United States. He finds the Blackfoot Territory similar to the Treaty 7 area which is a general description of the area encompassing southern Alberta, including the area bounded by the Red Deer River to the north, west of Medicine Hat, north of the United States' border and the landline east of the Rocky Mountains.

[8] The Blackfoot Confederacy included a number of Indian tribes, Blackfoot, Pagan, Blood and Sarcee. The affidavit of Kendall Panther Bone filed in support of an application for Intervenor status on behalf of the Siksika Nation deposes to the fact that Siksika signed Treaty 7 in 1877 and attaches Treaty 7, as well as a map of the Siksika Reserve, 70,985.8 hectares, and refers to the fact that Siksika members are part of the Blackfoot peoples and a member of the Blackfoot Confederacy. He states that pursuant to Treaty 7, the Siksika have a right to hunt and trap for food and carry out ceremonial practices within its traditional territory. He further states Siksika has a registered population of 6,681 persons with about 3,691 living on the Reserve. The interest of the Siksika Nation as set forth in the Panther Bone affidavit is that the exercise of harvesting rights under Treaty 7 has diminished over time, that the supply is currently limited in the Treaty 7 area and Siksika seeks to protect its traditional rights in southern Alberta.

[9] The other Intervenor applicant, the Blood Tribe, supports its intervention by the affidavit of Kirby Many Fingers, an elected Councillor of the Blood Tribe. The Blood Tribe has nearly 11,000 members, occupies the Blood Reserve located west of Lethbridge, south of Fort Macleod and on a reserve covering approximately 565 square miles. He also deposes to the fact that the Blood Tribe is a member of the Blackfoot Confederacy and that the area known as southern Alberta is part of their traditionally occupied and hunting lands. He says he is aware that the Appellant was convicted of two hunting offences that took place near Elkwater, Alberta in the Cypress Hills area of southern Alberta that is both within the territory covered by Treaty 7 and the traditional territory of the Blood Tribe and the Blackfoot Confederacy.

[10] He further states that hunting for sustenance and other traditional and Treaty based activities continue to be practised by members of the Blood Tribe in various parts of southern Alberta and most significantly, that "judicial recognition of a Metis right to hunt or fish for food within the Blood Tribe's Treaty 7 or traditional territory could clearly have an adverse impact on the Treaty rights of the Blood Tribe." He also states that the Blood Tribe, because they have developed specialized expertise in the law relating to Treaty and Aboriginal rights to hunt in southern Alberta and the Tribe's rights pursuant to Treaty 7 and the **Natural Resources Transfer Agreement**, 1930, S.C. c.3, (the "NRTA") can offer a particular legal perspective on those matters.

[11] The Appellant shot the mule deer giving rise to the charges against him at or near the boundary of Treaty 7 and Treaty 4 lands near the Cypress Hills in southeastern Alberta. Counsel

for the Blood Tribe asserts that the NRTA expanded the hunting rights of Aboriginal peoples subject to Treaty 7, including the Siksika Nation and Blood Tribe, to areas beyond the geographical limits of Treaty 7 to include, in the context of this case, the area of southern Alberta where the Appellant was hunting.

THE APPLICABLE LAW

[12] All parties cite Rule 2.10 of the *Alberta Rules of Court* which states as follows:

> 2.10 On application a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

[13] In ***Papaschase Indian Band v. Canada (Attorney General)***, 2005 ABCA 320, Chief Justice Fraser, speaking for the Court, said at para 2:

> It may be fairly stated that, as a general principle, an intervention may be allowed where the proposed intervenor is specially affected by the decision facing the Court or the proposed intervenor has some special expertise or insight to bear on the issues facing the court.

She went on at para 3 to cite ***Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs*** (1996), 199 N.R. (F.C.A.) 1 where it was stated "... an Intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence."

[14] Para 5 of ***Papaschase*** is also instructive referring to a two-step approach to the determination of an Intervenor application where it is stated that the Court typically considers first the subject matter of the proceeding and second determines the proposed Intervenor's interest in the subject matter.

[15] Another principle articulated at para 6 of ***Papaschase*** is that where cases involve constitutional issues or which have a "constitutional dimension", courts are generally more lenient in granting Intervenor status.

[16] In the context of Rule 1.1, I will leave it for another day whether the Alberta Rules of Court have any application to a summary conviction appeal which is governed by ss. 812-828 of the **Criminal Code of Canada**. I find, in this case, nothing in particular turns on that issue because of the existence of adequate case law in Alberta regarding the test for intervenor status in respect of the kind of an issue that is before me. Aside from ***Papaschase***, in a later case from the Court of Appeal of Alberta, ***Gift Lake Metis Settlement v Metis Settlements Appeal Tribunal***, 2008 ABCA 391, the Court cited ***Papaschase*** as well as an administrative law case, ***United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)***, 2002 ABCA 243 and

indicated that Intervenor status may also be granted where the proposed Intervenor's interest in the proceedings may not be fully protected or argued by a party.

ANALYSIS

[17] It would appear to be undisputed that the territory that is affected and under consideration in the appeal, namely southern Alberta, includes the territory encompassed by Treaty #7. Both Intervenors have a significant interest in the outcome of the appeal in terms of the potential invalidity of the **Wildlife Act** sections to identified Metis in southern Alberta. Should that happen, the ability of members of the Metis community, however defined, to hunt and fish in the traditional and Treaty #7 territories of the Siksika Nation and Blood Tribe may be regarded as equivalent to their own members' rights and that equivalency would logically dilute the fish and game available to members of the Intervenor tribes. This is a conservation issue. Therefore, I find they have a specific and significant interest in the outcome of the appeal insofar as that issue is concerned.

[18] It is more difficult to assess whether the Intervenors or either of them bring a special perspective not available to the appellant. The statement of Kirby Many Fingers in his Affidavit about prior involvement in the development of a specialized expertise in the law relating to Treaty and Aboriginal rights to hunt in southern Alberta has not been challenged. Mr. Panther Bone, on behalf of the Siksika Nation, deposed that the Siksika "seeks to assist the Court" as well as to protect its important traditional rights in southern Alberta.

[19] The Attorney General of Alberta ("Alberta") has argued that the Blood Tribe ought not to be permitted to make arguments not engaged by the facts of this case. He refers to three issues: "balancing of s. 35 rights held by First Nations and Metis"; the appropriateness of a collateral attack; the application of the ***Powley*** test. Alberta argues strongly that the balancing of s. 35 rights held by First Nations and Metis is not something that is properly before the Court; that the issue was not argued at the trial and no evidence was called in respect of this issue. With respect to the collateral attack issue, Alberta submits the Blood Tribe should not be granted leave to intervene on this issue because the Appellant is well positioned to provide argument on this issue from the perspective of an accused. Alberta does, however, concede or does not object to the Blood Tribe's application to make submissions regarding the application of the ***Powley*** test in the present appeal.

[20] Siksika desires to intervene on the collateral attack issue and the application of the ***Powley*** test. Alberta makes the same argument with respect to the collateral attack issue and the application of the ***Powley*** test with respect to Siksika as it did against the Blood Tribe. With respect to being granted a right of appeal, the Alberta cites the case of ***Dreco Energy Services Ltd. v. Wenzel***, 2008 ABCA 36 and says that it is undesirable that anyone other than the Crown to be vested with the sole discretion regarding an appeal against an acquittal of an accused person.

[21] The Appellant cites several legal principles for interventions including the Alberta cases of ***John Doe 1 v. Canada***, 2000 ABCA 217; ***R. v. De Trang***, 2002 ABQB 185; ***Pederson v. VanThournout***, 2008 ABCA 192; ***R v. Neve***, (1996) 184 A.J. No. 570 (Alta. C.A); ***R v. JLA***, 2009 ABCA 324. In addition, the Appellant cites ***R. v. Morgentaler***, [1993] 1 S.C.R. 462; ***Stoney Tribal Council v. Pancanadian Petroleum***, 2000 ABCA 164. The principles articulated in those authorities include the caution to courts to grant intervenor status sparingly, especially in criminal proceedings, the concern about delay, prejudice, the skewing or distortion of the issues by other voices and that if intervenor status is granted, the scope of the intervention should be limited.

DECISION

[22] I have considered all of the submissions of the parties, both written and oral, and note that neither the Appellant nor Alberta object to some of the issues being argued by the intervenors. On other issues, they are split. For example, the Appellant takes no issue with the Siksika Nation or the Blood Tribe making submissions with respect to whether a constitutional defence is a permissible "collateral attack" on the ***Wildlife Act***, whereas Alberta does.

[23] The Appellant also suggests that any costs associated with attaining intervenor status or participating as an intervenor would be borne by the intervenors as well as "any other costs incurred by the Appellant with respect to the interveners". The Appellant proposes a form of order with the following conditions:

(a) That they only be permitted to make submissions only with respect to the following issues:

  (i) Whether Mr. Hirsekorn's claims are a "collateral attack" on the *Wildlife Act* and as such barred;

  (ii) The application of the *Powley* test for establishing Metis harvesting rights.

(b) That they make written submissions, limited to 15 pages and file those submissions by May 9th, 2011;

(c) That they be limited to .5 hours each to make their oral submissions;

(d) That they not be permitted to adduce fresh evidence or expand the *lis*;

(e) That they must accept the filing and hearing schedule already set by this Court;

(f) That the Appellant be granted the opportunity to reply to the interveners' written submissions;

(g) That they will only have limited particpatory rights as interveners and will have no right of appeal in this matter; and

(h) That they bear the costs of their intervention and they will be responsible for any coordination or costs associated with production of the trial record for their review and use; and

(i) That they will be responsible for costs of any delays caused by their interventions.

[24] The Applicants' application to intervene in this matter will be granted. The intervenors' interest in the result of the appeal is direct and special. And they may bring a fresh perspective to the issues the Court must decide. However, the attainment of intervenor status comes with conditions. It is the responsibility of counsel, and the Court if necessary, to make certain the conditions are abided by. Not simply because they are there, but because fairness to the parties demands compliance.

[25] The same conditions will apply to each intervenor. They are:

1. The Intervenors will rely solely on the facts and evidence set out in the record of proceeding.

2. The Intervenors may address only the following issues on an appeal without further leave of the Court:

   a. The correct statement of the ***Powley*** test;

   b. The application of the ***Powley*** test to the facts and evidence;

   c. Whether a collateral attack is appropriate in the circumstances of this case.

3. The Intervenors will have no right of appeal.

4. The Intervenors will bear their own costs.

[26] The Intervenors will follow the time lines for submission of written argument and the order of oral argument as directed by this Court which will be the subject of a further application unless agreed to by the parties.

Heard on the 8th day of March, 2011.
Dated at the City of Calgary, Alberta this 9th day of March, 2011

Neil Wittmann
C.J.C.Q.B.A.

Appearances:

G. Rangi Jeerakathil
for the Applicant Siksika Nation

Kenneth R. McLeod
for the Applicant Blood Tribe

Jean Teillet and Jason Madden
for the Appellant

Thomas G. Rothwell and Angela Edgington
for the Attorney General of Alberta

Ramona Robins
for Her Majesty the Queen